TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 51

IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, ET AL., APPELLANTS,

vs.

CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED

APPEAL FROM THE SURROGATE'S COURT, KINGS COUNTY, STATE OF NEW YORK

FILED APRIL 21, 1941.

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of the Application of Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, for a determination of the right of Helena Day McGlone to elect under Section 18 of the Decedent Estate Law to take against the provisions of said Last Will and Testament and Codicil thereto of John J. McGlone, deceased.

Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., of the Estate of John J. McGlone, deceased, and Edward McGlone and Robert McGlone, infants, by Ralph L. Kaskell, Jr., Special Guardian, Ignatius V. McGlone, Thomas McGlone and Rose McGlone Meredith, Appellants,

Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, Respondent

Statement Under Rule 234

This proceeding was commenced pursuant to Section 145-a of the Surrogate's Court Act upon the petition of Irving Trust Company and Thomas F. McGlone, Jr., as [fol. 2] Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, for a determination of the right of Helena Day McGlone to elect under Section 18 of the Decedent Estate Law to take against the provisions of said Last Will and Testament and Codicil thereto of John J. McGlone, deceased. Said petition is dated the 26th day of November, 1937. Issue was joined on January 17th, 1938, by the service of the answers of the respondent Helena Day McGlone, Thomas F. McGlone and Rose McGlone Meredith, Ignatius V. McGlone, and George A. Voss, as Special Guardian for Edward McGlone and Robert McGlone, infants.

The names of the petitioners are Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased. The respondent was Helena Day McGlone.

Said Helena Day McGlone died on August 6th, 1939. By an order of this Court dated October 23rd, 1939, Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, was substituted as the respondent in place and stead of said Helena Day McGlone. The other parties to this proceeding are Thomas F. McGlone, Rose McGlone Meredith, Ignatius V. McGlone, Edward McGlone and Robert McGlone, the last two being infants, who previously appeared herein by George A. Voss, as Special Guardian. Said George A. Voss died on September 17th, 1939, and was succeeded by Ralph L. Kaskell, Jr., as Special Guardian herein. That in and by said order of this Court dated October 23rd, 1939, said Ralph L. Kaskell, Jr., as [fol. 3] Special Guardian for said infants, Edward McGlone and Robert McGlone, was substituted for George A. Voss, as Special Guardian for Edward McGlone and Robert McGlone, infants, as one of the appellants herein.

The name and address of the petitioners' attorneys are Orr & Brennan, Esqs., 16 Court Street, Borough of Brooklyn, City of New York, who also represent Thomas F. McGlone and Rose McGlone Meredith. The name and address of the respondent's attorney is Andrew F. Van Thun, Jr., 189 Montague Street, Borough of Brooklyn, City of New York. The office and post office address of Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants, is 161-19 Jamaica Avenue, Jamaica, New York. The attorney for Ignatius V. McGlone was said George A. Voss, whose address was 2 Rector Street, Borough of Manhattan, City of New York. No attorney has been substituted for said George A. Voss as attorney for said Ignatius V. McGlone. Said Ignatius V. McGlone resides at 88-10 239th Street, Bellerose, L. I.

Except as aforesaid, there has been no change in the parties or attorneys herein since the commencement of this proceeding.

[fol. 4] In Surrogate's Court, Kings County

In The Matter of the Application of Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, for a determination of the right of Helena Day McGlone to elect under Section 18 of the

Decedent Estate Law to take against the provisions of said Last Will and Testament and Codicil thereto of John J. McGlone, deceased.

NOTICE OF APPEAL BY IRVING TRUST CO. AND THOMAS F. McGLONE, JR., AS EXECUTORS, ETC., THOMAS F. McGLONE AND ROSE McGLONE MEREDITH.

SIRS:

Please Take Notice, that Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, and Thomas F. McGlone and Rose McGlone Meredith hereby appeal to the Appellate Division of the Supreme Court, Second Judicial Department, from that part and so much of the decree of Honorable George Albert Wingate, Surrogate, entered in the office of the Clerk of the Surrogate's Court, Kings County, on June 27th, 1939, as denies the prayer of the petitioners as contained in the petition herein and orders, adjudges and decrees that Helena Day McGlone, surviving spouse of John J. Mc-[fol. 5] Glone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30th, 1937, is a valid and effective exercise of such election, and orders, adjudges and decrees that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and administration expenses and any estate tax, and from each and every part of said decree, except so much of said decree as allows the sum of $2,500.00 to George A. Voss, Esq., Special Guardian of Edward McGlone and Robert McGlone, for his services as Special Guardian in this proceeding.

Dated, Brooklyn, N. Y., July 18th, 1939.

Yours, etc.,

Orr & Brennan, Attorneys for Petitioners, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, and

for Thomas F. McGlone and Rose McGlone Meredith, Office and P. O. Address, 16 Court Street, Brooklyn, N. Y.

[fol. 6] To: Andrew F. Van Thun, Jr., Esq., Attorney for Respondent, Helena Day McGlone, Office and P. O. Address, 189 Montague Street, Brooklyn, N. Y.; George A. Voss, Esq., Special Guardian for Edward McGlone and Robert McGlone, infants, and attorney for Ignatius V. McGlone, Office and P. O. Address, 2 Rector Street, New York, N. Y.; Percy T. Stapleton, Esq., Clerk of Surrogate's Court, Kings County.

In Surrogate's Court, Kings County

Notice of Appeal by Ignatius V. McGlone

Sirs:

Please Take Notice, that Ignatius V. McGlone hereby appeals to the Appellate Division of the Supreme Court, Second Judicial Department, from that part and so much of the decree of Honorable George Albert Wingate, Surrogate, entered in the office of the Clerk of the Surrogate's Court, Kings County, on June 27th, 1939, as denies the prayer of the petitioners Irving Trust Company and Thomas F. Mc-[fol. 7] Glone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, as contained in the petition herein, and orders, adjudges and decrees that Helena Day McGlone, surviving spouse of John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30th, 1937, is a valid and effective exercise of such election, and orders, adjudges and decrees that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and administration expenses and any estate tax, and from each and every part of said decree, except so much of said decree as allows the sum of $2,500.00 to George

A. Voss, Esq., Special Guardian of Edward McGlone and Robert McGlone, for his services as Special Guardian in this proceeding.

Dated, New York, July 20th, 1939.

Yours, etc.,

George A. Voss, Attorney for Ignatius V. McGlone, Office & P. O. Address, 2 Rector Street, Borough of Manhattan, New York City, N. Y.

[fol. 8] To: Orr & Brennan, Esqs., Attorneys for Petitioners, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, and for Thomas F. McGlone and Rose McGlone Meredith, Appellants, Office & P. O. Address, 16 Court Street, Brooklyn, New York; Andrew F. Van Thun, Jr., Esq., Attorney for Respondent, Helena Day McGlone, Office and P. O. Address, 189 Montague Street, Brooklyn, N. Y.; Percy T. Stapleton, Esq., Clerk of Surrogate's Court, Kings County.

[fol. 9] In Surrogate's Court, Kings County

Notice of Appeal by Special Guardian for Edward McGlone and Robert McGlone, Infants

Sirs:

Please Take Notice, that Edward McGlone and Robert McGlone, infants over the age of fourteen years, by George A. Voss, their Special Guardian, hereby appeal to the Appellate Division of the Supreme Court, Second Judicial Department, from that part and so much of the decree of Honorable George Albert Wingate, Surrogate, entered in the office of the Clerk of the Surrogate's Court, Kings County, on June 27th, 1939, as denies the prayer of the petitioners Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, as contained in the petition herein, and orders, adjudges and decrees that Helena Day McGlone, surviving spouse of John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said de-

cedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30th, 1937, is a valid and effective exercise of such election, and orders, adjudges and decrees that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and administration expenses and any estate tax, and from each and every part of said decree, except so much of said decree as allows the sum of $2,500.00 to George A. Voss, Esq., Special [fol. 10] Guardian of Edward McGlone and Robert McGlone, for his services as Special Guardian in this proceeding.

Dated, New York, July 20th, 1939.

Yours, etc.,

George A. Voss, Special Guardian for Edward McGlone and Robert McGlone, infants over the age of fourteen years, Office & P. O. Address, 2 Rector Street, Borough of Manhattan, New York City, N. Y.

To: Orr & Brennan, Esqs., Attorneys for Petitioners, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, and for Thomas F. McGlone and Rose McGlone Meredith, Appellants, Office & P. O. Address, 16 Court Street, Brooklyn, New York; Andrew F. Van Tiun, Jr., Esq., Attorney for Respondent, Helena Day McGlone, Office and P. O. Address, 189 Montague Street, Brooklyn, N. Y.; Percy T. Stapleton, Esq., Clerk of Surrogate's Court, Kings County.

[fol. 11] In Surrogate's Court, Kings County

Present: Hon. George Albert Wingate, Surrogate

Decree Appealed From—June 27, 1939

The above named Irving Trust Company and Thomas F. McGlone, Jr., having on or about the 26th day of November, 1937, presented their verified petition to this court, praying

for a decree determining that Helena Day McGlone, surviving spouse of the above named decedent, is not entitled to elect to take her share of the estate of said decedent as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law and determining that she voluntarily and irrevocably agreed to and did renounce, release and waive all rights in the estate of said decedent and that such agreement, renunciation, release and waiver is in full force and effect and determining that she has no interest or share in the estate of said John J. McGlone, deceased, except as provided in paragraph "Third" of the last Will and Testament of said decedent; and a citation having been thereupon issued out of this court directed to Helena Day McGlone, Rose McGlone Meredith, Thomas F. McGlone, Ignatius V. McGlone, Edward McGlone, Robert McGlone and Thomas F. McGlone, Jr., requiring them and each of them to show cause at the Surrogate's Court, Kings County, to be held on the 17th day of January, 1938, why such determination [fol. 12] should not be made, and said citation having been returned with proof of due service thereof upon all of the parties named; and the said petitioners having duly appeared on the return day of the citation by Orr & Brennan, Esqs., their attorneys, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., her attorney, and the court having appointed George A. Voss, Esq., special guardian for Edward McGlone and Robert McGlone, infants; and the respondent, Helena Day McGlone, having duly filed her answer to the petition herein and having by stipulation, dated September 14, 1938, amended paragraph "Two" in her answer, and Edward McGlone and Robert McGlone, infants, by George A. Voss, Esq., their special guardian, having filed their answer to the petition herein, and Ignatius V. McGlone having filed his answer to the petition herein, by George A. Voss, Esq., his attorney, and Thomas F. McGlone and Rose McGlone Meredith having filed their answer to the petition herein by Orr & Brennan, Esq.; and the matter having come on for hearing and trial on the 25th day of May, 1939, and the petitioners having appeared by their attorneys, Orr & Brennan, Esqs., in support of said petition, and Thomas F. McGlone and Rose McGlone Meredith, having appeared by their attorneys, Orr & Brennan, Esqs., and Edward McGlone and Robert McGlone, infants, having appeared by George A. Voss, Esq., their special guardian, and Ignatius

V. McGlone, having appeared by George A. Voss, Esq., his attorney, also in support of said petition, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., in opposition to the relief in said petition requested, and after hearing the proofs and allegations [fol. 13] of the parties, and after due deliberation having been had thereon, and a decision in writing having been filed by the Surrogate:

Now, on motion of Andrew F. Van Thun, Jr., Esq., attorney for respondent, Helena Day McGlone, surviving spouse of said decedent, it is

Ordered, adjudged and decreed that the prayer of the petitioners, as contained in the petition be and the same is in all respects denied; and it is further

Ordered, adjudged and decreed that Helena Day McGlone, surviving spouse of the said John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent, and that the notice of election pursuant to Section 18 of the Decedent Estate Law duly served by the said Helena Day McGlone on the said executors, and filed and recorded, with proof of due service thereof, in the office of the Clerk of the Surrogate's Court of the County of Kings on the 30th day of September, 1937, is a valid and effective exercise of such election; and it is further

Ordered, adjudged and decreed that the said Helena Day McGlone is entitled to one-half of the net estate of the said deceased after the deduction of debts, funeral and administration expenses and any estate tax; and it is further

Ordered, adjudged and decreed that Irving Trust Company and Thomas F. McGlone, Jr., as executors aforesaid, pay to George A. Voss, Esq., special guardian of Edward [fol. 14] McGlone and Robert McGlone, infants, the sum of $2,500.00 hereby allowed him for services as such special guardian in this proceeding.

G. A. W., Surrogate.

In Surrogate's Court, Kings County

Petition

To the Surrogate's Court of the County of Kings:

The petition of Irving Trust Company, a New York corporation, having its principal place of business at #1 Wall

Street, Borough of Manhattan, City and State of New York, and Thomas F. McGlone, Jr., residing at #617 Montgomery Building, City and County of Spartanburg, State of South Carolina, as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, respectfully shows to this Court and alleges:

First. That your petitioner, Irving Trust Company, is one of the Executors named in the Last Will and Testament and Codicil thereto of John J. McGlone, late of the County of Kings, deceased, and your petitioner, Thomas F. McGlone, Jr., is the other Executor named in the Codicil to the Last Will and Testament of John J. McGlone, late of the County of Kings, deceased.

Second. That at the time of his death said John J. McGlone resided at #22 Prospect Park West, in the Borough [fol. 15] of Brooklyn, County of Kings, City and State of New York, and died in the Long Island College Hospital, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 22nd day of February, 1937.

Third. That said deceased left him surviving his widow, Helena Day McGlone, Rose McGlone Meredith, a sister, Thomas F. McGlone, a brother, Ignatius V. McGlone, a brother, Thomas F. McGlone, Jr. (one of the petitioners herein), a nephew of the deceased, and being the son of the decedent's brother, Thomas F. McGlone aforementioned, Edward McGlone and Robert McGlone, nephews of the deceased, and being sons of the decedent's brother, Ignatius V. McGlone aforementioned, the only heirs at law and next of kin of said deceased.

Fourth. That said Last Will and Testament relates to both real and personal property and bears date the 21st day of August, 1930. That said Codicil to said Last Will and Testament relates to both real and personal property and bears date the 6th day of July, 1934. Copies of said Last Will and Testament and Codicil are hereto annexed, marked Exhibit "A" and made part hereof. That said Last Will and Testament and Codicil were duly proved and admitted to probate by and before this Court on April 8th, 1937, and Letters Testamentary thereon were on that date duly issued to your petitioners, the Executors named in said Last Will and Testament and Codicil thereto. That your petitioners have duly qualified thereunder and have since been and still

are acting as such Executors. That said Executors are also named in the Codicil to said Last Will and Testament as the Trustees of the trust thereby created.

[fol. 16] Fifth. That paragraph "Third" of said Last Will and Testament provides as follows:

"My dear wife, Helena Day McGlone, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my Executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character."

Sixth. That said John J. McGlone and Helena Day McGlone (then Helena Day Snyder), were married on February 4th, 1922 at Saint Edward's Church, Chiswick, London, England; that there was no issue of said marriage between John J. McGlone and Helena Day McGlone; that this was the third marriage for said Helena Day McGlone. Upon information and belief that she was first married to one Lewis, and her second marriage was to one Snyder. Upon information and belief that there was no issue of any of these marriages.

Seventh. Upon information and belief that at the time of her marriage to said John J. McGlone, said Helena Day McGlone was possessed of a fortune of her own, consisting of real and personal property, from which she was then [fol. 17] receiving an income of upwards of Twelve Thousand ($12,000.00) Dollars per year.

Eighth. Upon information and belief that said Helena Day McGlone is now about seventy-eight (78) years old; that she is possessed of real and personal property, and has ample means of supporting herself.

Ninth. That on or about February 2nd, 1922, in contemplation and in consideration of said marriage between John J. McGlone and Helena Day Snyder, and for other good and

valuable consideration, said Helena Day McGlone (then Helena Day Snyder) executed and delivered to said John J. McGlone a paper writing, photostatic copy of which is hereto annexed, marked Exhibit "B" and made part hereof. That said John J. McGlone and Helena Day Snyder were thereafter and on the 4th day of February, 1922, married as aforesaid. That at the time of the execution and delivery of said instrument said Helena Day Snyder had full knowledge of the nature, terms and effect thereof.

Tenth. That in and by said instrument, said Helena Day McGlone voluntarily and irrevocably agreed to and did renounce, waive and release all rights in the estate of said John J. McGlone, deceased.

Eleventh. That such agreement, waiver, release and renunciation is in full force and effect.

Twelfth. That on the 23rd day of September, 1937, said Helena Day McGlone served upon your petitioners herein [fol. 18] a notice of election to take her share of the estate of said John J. McGlone, deceased, as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law, a copy of which notice is hereto annexed, marked Exhibit "C" and made part hereof.

Thirteenth. That the only persons interested in this proceeding are the following:

Helena Day McGlone, widow, who resides at 22 Prospect Park West, Brooklyn, New York.

Rose McGlone Meredith, a sister, who resides at Gainesville, Virginia.

Thomas F. McGlone, a brother, who resides at Spartanburg, South Carolina.

Ignatius V. McGlone, a brother, who resides at 8810 239th Street, Queens Village, New York.

Pastor of Saint Peter's Roman Catholic Church of Harper's Ferry, West Virginia, Harper's Ferry, West Virginia.

Saint Peter's Roman Catholic Cemetery, Harper's Ferry, West Virginia.

Edward McGlone, a nephew, who resides at 8810—239th Street, Queens Village, New York.

Robert McGlone, a nephew, who resides at 8810—239th Street, Queens Village, New York.

Irving Trust Company, one of the Executors named in the Will and Codicil thereto of deceased (one of the peti-

tioners herein), having its principal place of business at #1 Wall Street, New York City, New York.

[fol. 19] Thomas F. McGlone, Jr., a nephew, and the other Executor named in the Codicil to the Will of the deceased (the other petitioner herein), who resides at 617 Montgomery Building, Spartanburg, South Carolina.

Upon information and belief that all the persons above named are of sound mind and full age, except Edward McGlone and Robert McGlone, each of whom is an infant over the age of fourteen years, and have no General or Testamentary Guardian. That it may be proper that some person be appointed as Special Guardian for said infants in this proceeding.

That no previous application for the relief herein sought has been made.

Wherefore, your petitioners pray for a decree:

1. Adjudging, Determining and Decreeing that said Helena Day McGlone is not entitled to elect to take her share of the estate of said decedent as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law.

2. Adjudging, Determining and Decreeing that said Helena Day McGlone voluntarily and irrevocably agreed to and did renounce, release and waive all rights in the estate of said John J. McGlone, deceased; and that such agreement, renunciation, release and waiver is in full force and effect.

3. Adjudging, Determining and Decreeing that said Helena Day McGlone has no interest or share in the estate of said John J. McGlone, deceased, except as provided in paragraph marked "Third" of the said Last Will and Testament of John J. McGlone, deceased.

[fol. 20] 4. That your petitioners have such other and further relief as to the Court may seem just and proper; and

5. That the persons above named be cited to show cause why the determination herein prayed for should not be made.

Dated: November 26th, 1937.

Irving Trust Company, by George A. Murphy, Assistant Secretary; Thomas F. McGlone, Jr., Petitioners.

(Verified by George A. Murphy, Assistant Secretary of Irving Trust Company, the 26th day of November, 1937.)

(Verified by Thomas F. McGlone, Jr., the 29th day of November, 1937.)

(Certificate of E. W. Miller, Clerk of Spartanburg County, attached to original.)

EXHIBIT "A" ATTACHED TO PETITION

I, John J. McGlone, of the Borough of Brooklyn, County of Kings, City and State of New York, hereby revoking any and all other Wills by me at any time heretofore made, do make, publish and declare the following to be my last Will and Testament.

First. I order and direct my Executors hereinafter named to pay all my just debts and funeral expenses as [fol. 21] soon as may be convenient after my decease.

Second. I direct my Executors to purchase two (2) Five Hundred ($500.00) Dollar bonds, either of the City or State of New York, or of the United States, paying therefor the par value if necessary, and any premium or expenses that may be necessary in making the said purchase, and I give and bequeath Five Hundred ($500.00) Dollars of the said bonds so to be purchased, to the Pastor at the time of my death, and his successors forever, of Saint Peter's Roman Catholic Church of Harper's Ferry, West Virginia, and request that the same be held and the income used for the offering of two (2) Masses annually for the repose of the souls of the family of Edward and Elizabeth McGlone (my father and mother), such Masses to be said in January and July of each year if convenient. Five Hundred ($500.00) Dollars of the said bonds so purchased, I give and bequeath to Saint Peter's Roman Catholic Cemetery, Harper's Ferry, West Virginia, or to the proper officials thereof, in perpetuity, to be held as a trust fund, the income of which is to be applied to keep in good order the plot in the said cemetery in which members of the McGlone family are interred.

J. J. McG.

Third. My dear wife, Helena Day McGlone, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate,

I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my [fol. 22] Executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character.

Fourth. All the rest, residue and remainder of my estate both real and personal, of whatsoever kind and wheresoever situated, I give, devise and bequeath in equal shares to my sister, Rose McGlone Meredith, of Gainesville, Virginia, and my two brothers, Thomas F. McGlone, of Spartanburg, South Carolina, and Ignatius V. McGlone, of 220-22 Davenport Avenue, Queens Village, Long Island, New York, and in the event of the death of either of my brothers above named leaving issue, I direct that the share which would have been paid over to my said brother be paid to his issue, per stirpes. In the event of the death of my sister, her share in my estate shall be divided equally between my brothers, or in the event of their death to their issue, per stirpes.

Fifth. I hereby nominate, constitute and appoint my brother, Ignatius V. McGlone, and Irving Trust Company of the City of New York, Executors of this my last Will and Testament, and I direct that they act as such without being required to give bond conditioned for the faithful performance of their duties.

J. J. McG.

In Witness Whereof, I have hereunto set my hand and seal this 21st day of August, in the year one thousand nine hundred and thirty.

John J. McGlone, (L. S.)

In the presence of: Witness: T. Genevieve Donlon. Witness: William H. Orr.

[fol. 23] The foregoing was Signed, Sealed, Published and Declared by the within named Testator, John J. McGlone, as and for his last Will and Testament in the presence of each of us, who, at his request, in his presence and in the presence of each other, did thereupon subscribe our names at the end thereof as witnesses thereto.

Witness: 1. Genevieve Donlon. Residing at: 8317 Colonial Road, Bklyn, N. Y. Witness: William H. Orr. Residing at: 615 Tremont Ave., Westfield, N. J.

I, John J. McGlone, of the Borough of Brooklyn, County of Kings, City and State of New York, having made my Last Will and Testament on August 21st, in the year one thousand nine hundred and thirty, do now make, publish and declare the following to be a Codicil to my said Last Will and Testament.

First. I hereby direct that the one-third of the residue of my estate payable to my brother, Ignatius V. McGlone, of Queens Village, Long Island, New York, under the terms of paragraph "Fourth" of my said Last Will and Testament, be given to my nephew, Thomas F. McGlone, Jr., and Irving Trust Company, in Trust, Nevertheless, to and for the following uses and purposes:

To receive, hold, invest and reinvest the same and to pay over the net income accruing from the same quarterly to my said brother, Ignatius V. McGlone, as long as he shall [fol. 24] live, and upon his death to divide the said one-third of my residuary estate into two equal parts, one part, being one-sixth of my residuary estate to continue to be held in trust by the said Thomas F. McGlone, Jr., and Irving Trust Company, for the benefit of my nephew, Edward McGlone, the income being paid over to him quarterly until he reaches the age of thirty-five (35) years, at which time the principal of said trust shall be paid over to him. The other one-half of the trust fund created for the benefit of my brother, Ignatius V. McGlone, being one-sixth of my residuary estate, shall continue to be held in trust by Thomas F. McGlone, Jr., and Irving Trust Company for the benefit of my nephew, Robert McGlone, the income being paid over to him quarterly until he reaches the age of thirty-five (35) years, at which time the principal of said trust shall be paid over to him.

J. J. McG.

In the event that either of my said nephews, Edward McGlone or Robert McGlone, should have reached the age of thirty-five (35) years before the death of my brother, Ignatius V. McGlone, then upon the latter's death, one-half of the trust fund set aside for his benefit shall be paid over to the nephew who shall have reached the age of thirty-five (35) years.

In the event that either of my said nephews, Edward McGlone or Robert McGlone, should die before reaching the age of thirty-five (35) years, leaving issue surviving, such issue shall take their parent's share, but if there be no issue, such share shall be added to the trust fund created for the benefit of the nephew who survives, and the principal thereof be paid over to him when he reaches the age of thirty-five (35) years.

[fols. 25-26] Second. I hereby revoke the appointment of my brother, Ignatius V. McGlone, as co-executor with the Irving Trust Company, of my last Will and Testament, and substitute my nephew, Thomas F. McGlone, Jr., of Spartanburg, South Carolina, in his place, so that I appoint Irving Trust Company and Thomas F. McGlone, Jr., Executors and Trustees of my said Last Will and Testament, and I direct that they act as such without being required to give bond conditioned for the faithful performance of their duties.

In all other respects, I hereby ratify and confirm my said Last Will and Testament, dated August 21st, 1930.

In Witness Whereof, I have hereunto set my hand seal this 6th day of July, in the year one thousand nine hundred and thirty-four.

John J. McGlone (L. S.)

In the presence of: Witness: Elizabeth C. Mell. Witness: William H. Orr.

The foregoing was Signed, Sealed, Published and Declared by the within named Testator, John J. McGlone, as and for a Codicil to his last Will and Testament, in the presence of each of us, who, at his request, in his presence and in the presence of each other, did thereupon subscribe our names at the end thereof as witnesses thereto.

Witness: Elizabeth C. Mell. Residing at: 119-20 Union Turnpike, Kew Gardens, N. Y. Witness: William H. Orr. Residing at: 615 Tremont Ave., Westfield, N. J.

(Here follow 2 photolithographs, side folios 27-28)

27 = 28

EXHIBIT "B," ATTACHED TO PETITION.

Oke Beverage,
Ostersby, Middlesex, England.
February 2-1922.

SAVOY HOTEL
LONDON
W.C.2

I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McElwee, in London, England, on February 4th, 1922, make to record of my free will, that as I already possess, in my own right, ample of this world's [illegible] of my own as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably, renounce all right, title and interest I might legally or otherwise have in any estate real or personal, of which my said husband, to be, John J. McElwee, might die seized.

Helena Day Snyder

27-28

[fol. 29] In Surrogate's Court, Kings County

Answer of Helena Day McGlone

The respondent, Helena Day McGlone, answering the petition herein, alleges:

One. Denies the allegation of paragraph "Eighth" except that she is about seventy-eight years of age.

Two. Admits the making of the paper writing marked Exhibit B mentioned in paragraph "Ninth" of the petition, and denies each and every other allegation therein contained.

Three. Denies each and every allegation contained in the paragraphs marked "Seventh," "Tenth" and "Eleventh."

Wherefore said respondent, Helena Day McGlone, prays for a decree adjudging, determining and decreeing that the notice of election to take her share of the estate of said John J. McGlone, deceased, as an intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law, heretofore served upon the petitioners as set forth in paragraph "Twelfth" of the petition herein, is valid.

Andrew F. Van Thun, Jr., Attorney for Respondent,
189 Montague Street, Brooklyn, New York.

(Verified by Helena Day McGlone on January 15th, 1938.)

[fol. 30] In Surrogate's Court, Kings County

Stipulation Amending Answer of Helena Day McGlone

The respondent, Helena Day McGlone, by her attorney, Andrew F. Van Thun, Jr., hereby admits for all purposes, that she delivered to John J. McGlone, the decedent above named, the paper writing referred to in paragraph "Ninth" of the petition and marked Exhibit "B," at the time she executed the same; and the said respondent further stipulates that paragraph "Two" of the answer heretofore interposed by her in the above entitled proceedings be deemed amended to read as follows: "Two: Admits the making of the paper writing marked Exhibit 'B' mentioned in paragraph 'Ninth' of the petition and admits the delivery of the said paper writing marked Exhibit 'B' by her to said John

J. McGlone, and denies each and every other allegation therein contained."

Dated, Brooklyn, N. Y., September 14th, 1938.

Andrew F. Van Thun, Jr., Attorney for Respondent, Helena Day McGlone.

[fol. 31] In Surrogate's Court, Kings County

Answer of Ignatius V. McGlone

Ignatius V. McGlone, by George A. Voss, his attorney, for an answer to the petition herein, alleges as follows:

First. He repeats and realleges each and every allegation contained in the petition with the same force and effect as if the same were here again set forth and repeated at length and hereby consents to the entry of a decree as prayed for in said petition.

George A. Voss, Attorney for Ignatius V. McGlone, Office & P. O. Address, 2 Rector Street, Borough of Manhattan, New York City.

(Verified by Ignatius V. McGlone on January 22nd, 1938.)

[fol. 32] In Surrogate's Court, Kings County

Answer of Edward McGlone and Robert McGlone, Infants, by Special Guardian

Edward McGlone and Robert McGlone, infants over the age of fourteen years, by George A. Voss, their Special Guardian, for an answer to the petition herein, allege as follows:

First. They repeat and reallege each and every allegation contained in the petition with the same force and effect as if the same were here again set forth and repeated at length and hereby consent to the entry of a decree as prayed for in said petition.

George A. Voss, Special Guardian for Edward McGlone and Robert McGlone, infants over fourteen years of age, Office & P. O. Address, 2 Rector Street, Borough of Manhattan, New York City.

(Verified by George A. Voss on January 22nd, 1938.)

[fol. 33] In Surrogate's Court, Kings County

Answer of Thomas F. McGlone, and Rose McGlone Meredith

Thomas F. McGlone and Rose McGlone Meredith, by Orr & Brennan, their attorneys, answering the petition herein:

First. Repeat and reallege each and every allegation contained in said petition with the same force and effect as if the same were here again set forth and repeated at length, and hereby consent to the entry of a decree as prayed for in said petition.

Orr & Brennan, Attorneys for Thomas F. McGlone and Rose McGlone Meredith, Office and P. O. Address, 16 Court Street, Borough of Brooklyn, City of New York.

(Verified by William H. Orr on January 17th, 1938.)

[fol. 34] In Surrogate's Court, Kings County

Statement of Evidence

Before Hon. Geo. A. Wingate, Surrogate

Surrogate's Court,
Brooklyn, New York,
May 25, 1939.

Appearances of Counsel:

Orr & Brennan, Esquires, Attorneys for Petitioners; Philip Zierler, Esquire, and William H. Orr, Esquire, of Counsel; also as attorneys for Thomas F. McGlone and Rose McGlone Meredith.

George A. Voss, Esquire, Special Guardian for Edward McGlone and Robert McGlone and Attorney for Ignatius V. McGlone, Beneficiary under the trust fund.

Andrew F. Van Thun, Jr., Esquire, Attorney for Helena Day McGlone, Respondent; George H. Burtis, Esquire, of Counsel.

Offers in Evidence

Mr. Zierler: I offer in evidence stipulation dated September 14, 1938, amending the answer of Helena Day McGlone.

Mr. Van Thun: No objection.

(Received in evidence and marked Petitioners' Exhibit 1 —May 25, 1939.)

Mr. Zierler: I offer in evidence the paper writing referred to in Paragraph Ninth of the petition and marked Exhibit "B."

Mr. Van Thun: No objection.

(Received in evidence and marked Petitioners' Exhibit 2 —May 25, 1939.)

[fol. 35] Mr. Zierler: And I offer in evidence the marriage certificate of Mr. and Mrs. McGlone.

Mr. Van Thun: No objection.

(Received in evidence and marked Petitioners' Exhibit 3—May 25, 1939.)

Mr. Zierler: The petitioners rest.

Mr. Van Thun: The respondent will rest, your Honor, except I would like to make this statement for the record, that in one of your Honor's opinions in this matter you stated that this document, Exhibit "B"—Exhibit 2, was holographic. It was not a holographic document. The signature of Helena Day——

The Surrogate: Wait a minute, wait a minute. He isn't talking about —oh, 2.

Mr. Van Thun: The signature of Helena Day Snyder is the only part of the document in the handwriting of Helena Day Snyder, now Helena Day McGlone.

The Surrogate: Is that statement accepted as proof of the fact?

Mr. Zierler: Yes, it is. We do not contend that is a holographic document.

The Surrogate: All right.

Mr. Zierler: Does your Honor want a set of the pleadings, marked pleadings?

The Surrogate: I think I will read them.

Mr. Zierler: May we have ten days, both sides, to submit briefs?

The Surrogate: Say June 5th?

Mr. Zierler: Thank you.

Mr. Van Thun: Thank you.

(Discussion off the record.)

Motions for Judgment

Mr. Van Thun: If your Honor please, may it be considered that both sides make a motion for judgment and decree?

The Surrogate: Yes, sir. All right.

[fol. 36] Brooklyn, New York, July 28, 1939.

I hereby certify that the foregoing record of the testimony taken in the matter of the Estate of John J. McGlone, deceased, is a true and correct transcript of the stenographic notes taken by me therein and of the whole thereof.

Gertrude A. Lynch, Official Reporter, Kings County Surrogate's Court.

Petitioner's Exhibit 1

(Stipulation dated September 14, 1938, Amending Answer of Helena Day McGlone, printed at page 30.)

Petitioner's Exhibit 2

(Same as Exhibit "B" Attached to Petition, printed at page 27.)

(Here follows 1 photolithograph, side folios 37-38)

CERTIFIED COPY OF AN ENTRY OF MARRIAGE

(6 & 7 WM. IV., CAP. 86).

GIVEN AT THE GE

Sec. 37 of the above Act enacts that "for every *general search* of the Indexes shall be paid the sum of *twenty shillings*, and "for every *particular search* the sum of *one shilling*, and for every Certified Copy the sum of *two shillings and sixpence*;" exclusive of Inland Revenue Stamp (54 & 55 Vict., c. 39) of *one penny*. Where the application is made by post and the search is conducted by the staff of the General Register Office, the *particular search* fee is *two shillings and sixpence*.

Applicati

REGISTRATION DISTRICT BRENTFORD

1922. Marriage solemnized at Our Lady of Grace High Road Chiswick in the District of Brentford

No.	When Married. (1)	Name and Surname. (2)	Age. (3)	Condition. (4)	Rank or Profession. (5)	Residence at the time of Marriage. (6)
114	Fourth February 1922	John Joseph McGlone	47 years	Bachelor	Vice President International Mercantile Marine Co. American Line.	Savoy Hotel London
		Helena Day Snyder	45 years	Widow	———	The Beverleys Thornbury Road Isleworth

Married in the Our Lady of Grace according to the Rites and Ceremonies of the Roman Catholics

This Marriage was solemnized between us, J.J.McGlone, Helena Day Snyder in the Presence of us, Walter Day, Linda Béroud

CERTIFIED to be a true Copy of an Entry in the Certified Copy of a Register of Marriages in the District above mentioned. Given at the GENERAL REGISTER OFFICE, SOMERSET HOUSE, LONDON, under the Seal of the said Office, the 26th day of

M 19932

This Certificate is issued in pursuance of and subject to the following Acts:—6 & 7 Will. IV., c. 86, sec 38; 24 & 25 Vict., c. 98, sec. 36; The Acts 6 & 7 Will. IV., c. 86, sec. 38, enacts "That all Certified Copies of Entries, purporting to be Sealed or Stamped with the Seal of the Ge Death or Marriage to which the same relates, without any further or other proof of such Entry; and no Certified Copy purporting to be given in or Stamped as aforesaid."

Any person who (1) falsifies any of the particulars on this Certificate, or (2) uses a falsified certificate as true, knowing it to be false, is liabl

(5,827) W.L17288/71 20,000 8/28 Hw. G.9889 4043

F AN ENTRY OF MARRIAGE

WM. IV., CAP. 86).

"for every *general search* of the Indexes shall be paid the sum of *twenty shillings*, and [illegible] *one shilling*, and for every Certified Copy the sum of *two shillings and sixpence*;" [illegible] 55 Vict., c. 39) of *one penny*. Where the application is made by post and the search Register Office, the *particular search* fee is *two shillings and sixpence*.

GIVEN AT THE GENERAL REGISTER OFFICE,
SOMERSET HOUSE, LONDON.

Application Number 15074

REGISTRATION DISTRICT BRENTFORD

[illegible]olemnized at Our Lady of Grace High Road Chiswick in the District of Brentford in the County of Middlesex

Name and Surname. (3)	Age. (5)	Condition. (4)	Rank or Profession. (6)	Residence at the time of Marriage. (7)	Father's Name and Surname. (7)	Rank or Profession of Father. (8)
[illegible]n Joseph McGlone	47 years	Bachelor	Vice President International Mercantile Marine Co. American Line.	Savoy Hotel London	Edward McGlone (deceased)	Independent Means
[illegible]lena Day Snyder	45 years	Widow	———	The Beverleys Thornbury Road Isleworth	James Alexander Day (deceased)	Captain Army M.N.I.

[illegible]dy of Grace according to the Rites and Ceremonies of the Roman Catholics by Licence by me,

[illegible]oGlone
[illegible]a Day Snyder
} in the Presence of us, { Walter Day, Linda Béroud

Edmund F. Egan Canon
W.J. Gardener Registrar

true Copy of an Entry in the Certified Copy of a Register of Marriages in the District above mentioned.

[illegible]L REGISTER OFFICE, SOMERSET HOUSE, LONDON, under the Seal of the said Office, the 26th day of May 1938

This Certificate is issued in pursuance of and subject to the following Acts:—6 & 7 Will. IV., c. 86, sec 38; 24 & 25 Vict., c. 98, sec. 36; 3 & 4 Geo. V., c. 27, sec. 3, 5 & 6.

The Acts 6 & 7 Will. IV., c. 86, sec. 38, enacts "That all Certified Copies of Entries, purporting to be Sealed or Stamped with the Seal of the General Register Office, shall be received as evidence of the Birth, Death or Marriage to which the same relates, without any further or other proof of such Entry; and no Certified Copy purporting to be given in the said Office shall be of any force or effect which is not Sealed or Stamped as aforesaid."

Any person who (1) falsifies any of the particulars on this Certificate, or (2) uses a falsified certificate as true, knowing it to be false, is liable to Prosecution.

ONE PENNY

EXHIBIT 3
SURROGATES COURT
[illegible] COUNTY

37-38

[fol. 39] In Surrogate's Court, Kings County

Opinion

By Mr. Surrogate Wingate.

Matter of Irving Trust Co., &c. (John J. McGlone, dec'd; File No. 1714, 1937)—In view of the earnest and repeated efforts of the petitioners to defeat the present widow's right of election without a hearing on the merits (Matter of McGlone, 166 Misc., 636; 169 id., 498, aff'd 256 App. Div., 1074), the actual trial of the issues appeared as something of an anti-climax.

No testimony was introduced, the composite showing being the introduction into evidence of three documents, namely, first, a stipulation amending the answer of the widow so as to admit her subscription and delivery of the paper upon which her opponents rely to defeat her rights; second, the paper itself; and third, a certified copy of the marriage certificate of the parties, showing the consummation of their marriage on February 4, 1922. Finally, a stipulation was entered on the record that the asserted renunciation or waiver by the present widow of rights in the estate of her husband was not in her handwriting but in that of some other unidentified individual and that the only portion thereof which was written by her was the signature.

It follows, both sides having rested, that the issue raised by the executors to the effect that the widow is precluded from exercising her asserted right of election must be determined on this meagre demonstration and on the showing of the record, consisting preponderantly of the allegations of the petition in so far as they are not denied.

In view of the denials of paragraphs seventh to eleventh of the petition except for the admission in paragraph two [fol. 40] of the answer that the widow signed and delivered to the decedent the alleged waiver, and the failure to introduce any evidence in support of the allegations therein made, they must, except for the noted admissions, be excluded from consideration in the evaluation of the composite situation.

As thus reduced to lowest terms, the record demonstrates that the parties validly intermarried on February 4, 1922. Two days prior to the solemnization of the nuptials, the present widow signed and turned over to the decedent a

document which had not been prepared by her, and "knowledge of the nature, terms and effect" of which she denies. This document reads as follows:

"I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized. Helena Day Snyder."

The decedent died a resident of this county on February 22, 1937, survived by the widow, a sister, two brothers and three nephews, sons of deceased brothers, as his only statutory distributees. His estate, as valued in the estate tax proceedings, of which this court may take judicial notice (Matter of Surpless, 143 Misc., 48, 50; Matter of Morningstar, 143 Misc., 620, 623; Matter of Blake, 146 Misc., [fol. 41] 780, 781-782; Matter of Goldowitz, 153 Misc., 182, 184; Matter of Greenberg, 158 Misc., 446, 448; Matter of Reilly, 165 Misc., 214, 218; Matter of Grube, 7 N. Y. S., 2d, 794, 798, not otherwise reported) amounted to $236,852.74.

His will was executed on August 21, 1930, and a codicil thereto was dated on July 6, 1934. Both were admitted to probate in this court on April 8, 1937. By reason of the execution of the codicil subsequent to August 31, 1930, the composite testamentary disposition is brought within the purview of section 18 of the Decedent Estate Law (Matter of Greenberg, 141 Misc., 874, 880, 881, aff'd 236 App. Div., 733, aff'd 261 N. Y., 474), with the result, since the valid inception of the marriage is both demonstrated and admitted, that the widow is presumptively entitled (Matter of Green, 155 Misc., 641, 649, aff'd 246 App. Div., 583; Matter of Vogel, 251 App. Div., 741) to receive a testamentary benefit, at least partly in cash and the balance on a life trust, amounting to $118,426.37 (Decedent Estate Law, sec. 83, subdiv. 4; Decedent Estate Law, sec. 18, subdiv. 1a). The testamentary instruments, as probated, gave her a general legacy of $2,000 and no more.

In view of the noted presumption which arises by reason of the demonstration of the valid marriage between the parties, the burden is imposed upon those contending for a contrary result to show some legal reason why the right of election accorded by section 18 of the Decedent Estate Law and asserted by the widow should not be effectuated. By reason of the composite demonstration it is presently immaterial whether this burden is one of proof or merely of going forward.

Since the right of election accorded to a surviving spouse by section 18 is absolute except as expressly conditioned by [fol. 42] the terms, of the section, the burden is imposed upon the petitioners who seek a determination that such right is not possessed by this widow to demonstrate the existence of some exception in the statute which has the effect of depriving her of its benefits. They point for this purpose to subdivision 9 of section 18, which reads: "9. The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

Two matters are notable in the language employed in this section. The first is that the only variety of document which, under its language, is declared effective to bar the elective right of the surviving spouse is one which is "subscribed and duly acknowledged." This requirement is prescribed whether such document be "an instrument" required for waiver of the right to elect against an identified will, or "an agreement" prescribed as prerequisite if all rights of the surviving spouse, in their entirety, are to be relinquished. In other words, this requirement of acknowledgement is expressly stipulated in respect of each of the three varieties of documents contemplated in the section, namely, the "instrument" of waiver against a single identified will, the "agreement" of waiver against any will which [fol. 43] is executed after the effective date of the statute, and the "agreement" of waiver or release executed prior to the effective date of the statute.

According to the terms of the subsection it is only a document of this particular description and presenting this prescribed characteristic which will be effective for the purpose of depriving the surviving spouse of the enlarged statutory rights of participation in the estate of her deceased husband accorded her by section 18. In view of the remedial nature of the legislation effected in this enactment as a whole and the liberal interpretation of its terms in favor of the enlarged rights of the survivor which has continuously been practiced and enjoined (Matter of Byrnes, 260 N. Y., 465, 474; Rubin v. Myrub Realty Co., Inc., 244 App. Div., 541, 544; Matter of Greenberg, 141 Misc., 874, 885-886, aff'd 236 App. Div., 733, aff'd 261 N. Y., 474, 479; Thompson v. Thompson, 163 Misc., 946, 950, aff'd 254 App. Div., 601; Matter of Moore, 165 Misc., 683, 690; Matter of Collins, 156 Misc., 783, 785; Matter of Brown, 153 Misc., 282, 287; Matter of Harris, 150 Misc., 758, 760, 761; Matter of Simeone, 141 Misc., 737, 746), it seems apparent that any document should be subjected to strict scrutiny which is tendered in support of a contention that the relief made available for spouses in general may not be claimed by the particular spouse whose rights are in question.

The present document does not comply with the specification of the statute, which is applicable in this regard, namely, that the rights of a surviving spouse may be foreclosed only by an "agreement" "subscribed and duly acknowledged," since this instrument is not acknowledged. The opponents of the widow contend, however, that if the [fol. 44] statute be interpreted as invalidating this instrument, it must be held to be in contravention of article 1, section 10, paragraph 1, of the United States Constitution, and therefore void. The inhibition thus raised is, of course, that "No state shall * * * pass any * * * law impairing the obligation of contracts."

The question is accordingly presented as to whether this unilateral declaration granting for purposes of argument its validity for any purpose is a contract within the contemplation of the federal constitution.

In Louisiana v. Mayor of New Orleans (109 U. S., 285, 288), and again in Morley v. Lake Shore Railway Co. (146 U. S., 162, 170) the United States Supreme Court said: "The term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds for considerations proceeding from one to the other,

to do, or not to do, certain acts. Mutual assent to its terms is of its very essence."

To this may be added the statement by the same tribunal in Edwards v. Kearzey (96 U. S., 595, 599-600): "A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done."

It is obvious from these statements that in constitutional issues the concept of a contract is precisely the same as in ordinary litigations. The two indispensable essentials are an agreement or "meeting of the minds" of the contracting parties and a consideration moving to the person against whom enforcement of the asserted agreement is sought. Without these two elements no contract can be demonstrated to exist and no constitutional question may arise.

[fol. 45] "The prohibition of the federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any State action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition" (Louisiana v. Mayor of New Orleans, 109 U. S., 285, 288).

"No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting" (Wisconsin & Michigan Railroad v. Powers, 191 U. S., 379, 386).

The document here in question does not purport to constitute a contract or agreement. It is a declaration of purpose and intention by the prospective bride only. Not only is no promise made by her but no consideration is expressed or implied. It is closely analogous to those situations which have repeatedly been litigated and in which the uniform determination has been made that no contract was consummated, in which a state has announced a given policy, later reversed, upon which individuals have sought to predicate contract rights. Respecting such a situation Mr. Justice Holmes, writing for the unanimous court, said in Wisconsin & Michigan Railroad v. Powers (191 U. S., 379, 386) "the presence or absence of consideration is an aid to construction in doubtful cases—a circumstance to take into ac-

count in determining whether the state has purported to bind itself irrevocably or merely has used words of [fol. 46] prophecy, encouragement or bounty, holding out a hope but not amounting to a covenant."

Here there is no promise—merely a declaration of intention. There is also no consideration either recited or demonstrated. In attempted avoidance of this difficulty the petitioners urge that the decedent married the present widow and that marriage has been held to constitute a valid consideration. Granting both premises, there is no inference on the record that the marriage two days later was viewed by the parties as a consideration for the declaration. It is primary that nothing may be deemed a consideration which is not so considered by both parties (Walton Water Co. v. Village of Walton, 238 N. Y., 46, 51; Beck v. Sheldon, 259 N. Y., 208, 211; Edrington-Minot Corp'n v. Garsson, Inc., 219 App. Div., 65, 67). "The fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough * * *. Promis-or and promissee must have dealt with it as the inducement to the promise" (McGovern v. City of New York, 234 N. Y., 377, 389; Walton Water Co. v. Village of Walton, 238 N. Y., 46, 51).

Even had it been demonstrated in the present case that the parties considered the consummation of the marriage to be a consideration for the agreement by the bride-elect, of which there is not the slightest indication, this could not, on the showing of the record, supply the requisite consideration for an agreement by the widow, since it is obvious that the parties had already agreed to intermarry and it is elementary that an agreement to to an act which one is already obligated to perform, or actual performance thereof, does not supply an adequate consideration for a [fol. 47] new agreement by the person in whose favor the obligation already exists (Carpenter v. Taylor, 164 N. Y., 171, 177; O'Meara Co. v. Nat. Park Bank, 239 N. Y., 386, 399; 269 Canal Street Corp'n v. Zurich General Accident & Liability Ins. Co., 226 App. Div., 516, 519, aff'd 252 N. Y., 603; Melnick v. Kukla, 228 App. Div., 321, 324).

It is obvious, therefore, that the document in question, not having been acknowledged, does not comply in this regard with the only variety of instrument which under subdivision 9 of section 18 of the Decedent Estate Law will be effective to bar the widow's right of election.

The infirmity of the document does not, however, terminate here. The subdivision expressly prescribes the particular variety of instrument which is requisite for a waiver of the rights of election of a surviving spouse against all wills or in situations in which it was executed prior to the effective date of the statute. In both such connections such instrument must be "an agreement." This term is a word of art possessing a well defined and thoroughly established meaning in the law not only of this state but of every other common-law jurisdiction.

An "agreement" is a mutual assent (Rohr v. Baker, 13 Ore., 350, 10 Pac., 627; Jones v. Williams, 139 Mo., 1, 40 S. W., 353, 367; Richardson v. Clements, 89 Penn St., 503, 505; United States v. Richards, 149 Fed. 443, 451; Carter v. Prairie Oil & Gas Co., 58 Okl., 365, 160 Pac., 319, 322; Dixie Fire Ins. Co. v. Wallace, 153 Ky., 677, 156 S. W., 140, 141; Williams v. Diesel, 65 Okl., 163, 165 Pac., 187, 188) or coming together in accord or meeting of the minds (Leonard v. Marshall, 82 Fed. 396, 399; United States v. [fol. 48] Richards, 149 Fed., 443, 451; Southern Surety Co. v. Phillips, 181 Ark., 14, 24 S. W., 2d, 870, 872), of two or more parties (Jones v. Williams, 139 Mo., 1, 40 S. W., 353, 367; Arnold v. Scharbauer, 116 Fed., 492, 497; Richardson v. Clements, 89 Penn. St., 503, 505; Carter v. Prairie Oil & Gas Co., 58 Okl., 365, 160 Pac., 319, 322; Tucker v. Pete Sheeran Bro. & Co., 155 Ky., 670, 160 S. W., 176, 178; Williams v. Diesel, 65 Okl., 163, 165 Pac., 187, 188; Southern Surety Co. v. Phillips, 181 Ark., 14, 24 S. W., 2d, 870, 872), on a consideration (Arnold v. Scharbauer, 116 Fed., 492, 497). The term connotes a mutual obligation (Benedict v. Pincus, 191 N. Y., 377, 383, 384; Moran v. Standard Oil Co., 211 N. Y., 187, 197; Davis v. Frank, 102 Misc., 683, 684), and is synonymous with the word "contract" (Durham v. Taylor, 29 Ga., 166, 176; Sage v. Wilcox, 6 Conn., 81, 84; Barnard v. Lancashire Ins. Co., 101 Fed., 36, 37; United States v. Edgar, 45 Fed., 44, 46; Michael v. Kennedy, 166 Mo. App., 462, 148 S. W., 983, 984; Douglass v. Williams Art Co., 143 Ga., 846, 85 S. E., 993; Moss v. Winston, 218 Ala., 364, 118 So., 739, 740). As is said in Bingham v. Insurance Co. of North America (74 Wis., 498, 43 N. W., 494, 495): "To constitute an agreement, the minds of both parties must meet. That means * * * that one can not make an agreement alone; that both must understand the agreement alike, and must assent to that

agreement; or, to use the term the law uses in such a case, the minds of the parties must meet upon the subject of the agreement" (see also White v. Allen Kingston Motor Car Co., 69 Misc., 627, 628). Mutual assent and obligation are inherent in the legal conception of an agreement, wherefore purely unilateral action as in the giving of a quitclaim can never constitute an "agreement" (Chamberlain v. Abrams, 36 Wash., 587, 79 Pac., 204, 205).

[fol. 49] The present document does not purport to be even so much as a quitclaim. It is merely a unilateral statement of intention and is accordingly not an "agreement" within the well established connotation of the term.

Those seeking to profit at the expense of the widow contend, however, that when the Legislature twice employed this word of definite legal meaning it did not intend to use it in the sense in which it is habitually employed and designed merely to require a unilateral waiver. As authority for this position they tender Matter of Moore (165 Misc., 683). The court is familiar with this decision and, despite its high regard for its distinguished author, has already expressed its inability to concur in his view (Matter of Shapiro, 154 Misc., 55, 58).

That a waiver of the right to elect against a single identified will may be accomplished by a unilateral instrument is unquestionable because the Legislature has expressly so provided. In respect of a waiver against any will made either before or after the effective date of the statute, the Legislature has pointedly and with reiteration adopted a diverse provision phrased in language possessing a well established legal connotation, and this court does not feel itself justified in holding that these expressly and, to its mind, deliberately chosen, diverse requirements are capable of being accorded a meaning identical with that aptly but differently described in respect of waiver of the right to elect against the provisions of an identified will.

As has hereinbefore been indicated the word "agreement" possesses a well defined meaning in the law, and it is an established principle of statutory construction that [fol. 50] in such a situation its technical connotation must be accorded to it in the absence of unmistakable demonstration of a contrary intention (Perkins v. Smith, 116 N. Y., 441, 448; People, &c., v. Wainwright, 237 N. Y., 407, 412; People ex rel. Hunt v. Lane, 132 App. Div., 406, 407-408 aff'd 196 N. Y., 520), which is here absent.

In the opinion of the court, therefore, the document tendered for the purpose of defeating the elective rights of the widow is defective and invalid for that purpose, both by reason of the fact that it is not acknowledged and because it is not the type of document, namely "an agreement," which has been prescribed by the Legislature for the purpose.

In view of its inadequacy under the provisions of subdivision 9 of section 18 of the Decedent Estate Law and the fact that it does not constitute an enforcible contract or agreement at common law inhibiting the assertion of elective rights, its efficacy, if any, for the purpose of disinheriting the widow must be predicated upon the equitable doctrines of waiver or estoppel.

To establish waiver, it must be shown that there was a deliberate, informed abandonment of known rights (Alsens American Portland Cement Works v. Degnon Contracting Co., 222 N. Y., 34, 37; Draper v. Oswego County Fire Relief Ass'n, 190 N. Y., 12, 16; Ansorge v. Belfer, 248 N. Y., 145, 150; Matter of Feldhus, 165 Misc., 122, 123, aff'd 254 App. Div., 903, aff'd 280 N. Y., 568, 20 N. E., 2d, 17; Matter of Heim, 166 Misc., 931, 937, aff'd 255 App. Div., 1007; Matter of Miller, 162 Misc., 563, 571, aff'd 252 App. Div., 872). Here there is no such demonstration. On the contrary no evidence has been introduced in support of the [fol. 51] allegation, expressly denied by the widow, that at the time of its signature she had "knowledge of the nature, terms and effect" of the document. The petitioner has, therefore, failed to demonstrate a situation to which the equitable doctrine of waiver is applicable.

To constitute an estoppel against her, it must have been demonstrated that the testator altered his position in reliance on the document (Lawrence v. Brown, 5 N. Y., 394, 401; Jewett v. Miller, 10 N. Y., 402, 409; Mfrs. & Traders Bank v. Hazard, 30 N. Y., 226, 230; Continental Nat. Bank v. Nat. Bank of Commonwealth, 50 N. Y., 575, 581; Blair v. Wait, 69 N. Y., 113, 116; Rothschild v. Title Guar. & Trust Co., 204 N. Y., 458, 464; Matter of Leverich, 135 Misc., 774, 778, aff'd on opinion of this court 234 App. Div., 625). Of any such situation the record contains not a scintilla of evidence.

The court therefore deems the document submitted in defeasance of the rights of the widow wholly nugatory on grounds entirely different from those upon which its for-

mer decisions denying judgment on the pleadings to the petitioners were predicated (166 Misc., 636; 169 Misc., 498). It bows to the superior authority of the Appellate Division of this department in its determination (Matter of Rogers, 250 App. Div., 26, 28) that in dealings between husband and wife or prospective spouses "there is no presumption of inequality either way from these relations merely," although it must confess to some difficulty in reconciling this position with the statements of the Court of Appeals in such cases as Matter of Smith (95 N. Y., 516, 522), Pierce v. Pierce (71 N. Y., 154, 158), Graham v. Graham (143 N. Y., 573, 580), Marx v. McGlynn (88 N. Y., 357, 371) and Matter of Putnam (257 N. Y., 140, 143). In any event, [fol. 52] this portion of the rule of the case has now become immaterial in view of its further statement: "But when it appears prima facie that the parties have been dealing with each other under circumstances of inequality, then a presumption arises as against the husband especially if the transaction has resulted in detriment to the wife."

Here the prospective wife, on the eve of her marriage, was induced to sign a document, not prepared by her, knowledge of the nature, terms and effect of which she denies, the effect of which is to deprive her, utterly without any intimation or semblance of consideration of rights of inheritance worth $116,426.37. If this demonstration is not a prima facie sufficient indication of inequality and overreaching on the part of the prospective husband to require his estate to come forward with some explanation demonstrating that no advantage was taken by him of the relationship which the Court of Appeals has on at least two occasions held to be one of confidence and justified reliance (Pierce v. Pierce, 71 N. Y., 154, 158; Graham v. Graham, 143 N. Y., 573, 580) it would seem that the effect of subsection 9 of section 18 of the Decedent Estate Law, as interpreted, has made it possible for a designing spouse or prospective spouse to nullify the entire beneficent purpose of the enactment with virtual impunity.

The court can not believe this to be the law. On the contrary, it conceives the correct doctrine to be that "the courts regard with rigid scrutiny an ante-nuptial contract which deprives her (the wife) of any prospective interest in the estate of her intended husband, and especially is this

survives him" (Graham v. Graham, 143 N. Y., 573, 580) [fol. 53] and "that the courts require strict proof of fairness, when called upon to enforce an anti-nuptial contract against the wife, and especially when it is apparent that the provision made for the wife is inequitable, unjust and unreasonably disproportionate to the means of the husband. *The rule undoubtedly is that in such a case every presumption is against the validity of the contract, and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a valid and subsisting agreement*" (Pierce v. Pierce, 71 N. Y., 154, 158). Italics not in original.

For the reasons stated the court determines that the present widow is entitled to assert and has validly claimed her right of election to take her intestate share in contravention of the terms of the will pursuant to the provisions of section 18 of the Decedent Estate Law.

Enter decree on notice in conformity herewith.

[fol. 54] In Surrogate's Court, Kings County

Stipulation Settling Case

It is hereby stipulated that the foregoing case contains all the evidence given upon the trial of this action, and that the same be settled and ordered to be filed and annexed to the judgment roll herein.

Dated, New York, November —, 1939.

Orr & Brennan, Attorneys for Appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith. Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, Infants, Appellants. Ignatius V. McGlone, Appellant Appearing Pro Se. Andrew F. Van Thun, Jr., Attorney for Respondent Chase L. Day as Executor, etc., of Helena Day McGlone, Deceased.

In Surrogate's Court, Kings County

Order Settling and Filing Case

On the above stipulation the foregoing case on appeal containing all the evidence, is hereby settled and ordered on file.

Dated, New York, November —, 1939.

George A. Wingate, Surrogate, Kings County.

[fol. 55] In Surrogate's Court, Kings County

Stipulation Waiving Certification

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, judgment roll, and case and exceptions as settled, and the whole thereof now on file in the office of the Clerk of the Surrogate's Court, County of Kings, and certification thereof by the Clerk pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, New York, November , 1939.

Orr & Brennan, Attorneys for Appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith.

Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants, Appellants.

Ignatius V. McGlone, Appellant appearing pro se.

Andrew F. Van Thun, Jr., Attorney for Respondent Chase L. Day as Executor, etc., of Helena Day McGlone, deceased.

[fol. 56] In Surrogate's Court, Kings County

Order Filing Record in Appellate Division

Pursuant to Section 616 of the Civil Practice Act it is

Ordered, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department.

Dated, New York, November , 1939.

George A. Wingate, Surrogate, Kings County.

[fol. 57] IN SURROGATE'S COURT, KINGS COUNTY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

Please Take Notice that Chase L. Day, as executor under the Last Will and Testament of Helena Day McGlone, deceased, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, Second Department, dated and entered in the office of the Clerk of said Appellate Division, Second Department, on the 29th day of January, 1940, reversing the decree of the Surrogate of the County of Kings entered in this proceeding in the office of the Clerk of the Surrogate's Court of Kings County on June 27, 1939, whereby it was adjudged that Helena Day McGlone, surviving spouse of John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the Will and Codicil of said [fol. 58] decedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30, 1937, is a valid and effective exercise of such election and further adjudged that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and administration expenses and any estate tax; and from the decree or order of the Surrogate's Court, Kings County, entered upon said order of reversal of the Appellate Division in the office of the Clerk of the Surrogate's Court, Kings County, on the 15th day of March, 1940; and the said Chase L. Day, as executor under the Last Will and Testament of Helena Day McGlone, deceased, appeals from each and every part of aid order of reversal and said decree entered upon said order of reversal, as well as from the whole thereof.

Dated, March 30th, 1940.

Andrew F. Van Thun, Jr., Attorney for Chase L. Day, as executor, etc. of Helena Day McGlone, deceased, 189 Montague Street, Brooklyn, New York.

To: Percy T. Stapleton, Esq., Clerk of the Surrogate's Court.

[fol. 59] Orr & Brennan, Esqs., Attorneys for petitioners, Irving Trust Company and Thomas F. McGlone, Jr., as executors, etc., of John J. McGlone, deceased, and attorneys for Thomas F. McGlone and Rose McGlone Meredith.

Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants.

Ignatius V. McGlone, appearing pro se.

In Surrogate's Court, Kings County

[Title omitted]

Present: Hon. George Albert Wingate, Surrogate

Order Appealed from—March 15, 1940

The above named Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testa-[fol. 60] ment and Codicil thereto of John J. McGlone, deceased, having petitioned this Court by verified petition dated November 26th, 1937, for a decree adjudging, determining and decreeing that said Helena Day McGlone is not entitled to elect to take her share of the estate of said decedent as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law; adjudging, determining and decreeing that said Helena Day McGlone voluntarily and irrevocably agreed to and did renounce, release and waive all rights in the estate of said John J. McGlone, deceased; and that such agreement, renunciation, release and waiver is in full force and effect; adjudging, determining and decreeing that said Helena Day McGlone has no interest or share in the estate of said John J. McGlone, deceased, except as provided in paragraph marked "Third" of the said Last Will and Testament of John J. McGlone, deceased, and a citation having thereupon issued out of this Court directed to said Helena Day McGlone, Rose McGlone Meredith, Thomas F. McGlone, Ignatius V. McGlone, Edward McGlone, Robert McGlone and Thomas F. McGlone, Jr., requiring each of them to show cause at the Surrogate's Court, Kings County, on the 17th day of January, 1938, why a decree as prayed for in said petition should not be made, and said citation having been returned with proof of due service thereof upon all of the parties named, and

the said petitioners having duly appeared on the return day of the citation by Orr & Brennan, Esqs., their attorneys, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., her attorney, and the Court having appointed George A. Voss, Esq., Special [fol. 61] Guardian for Edward McGlone and Robert McGlone, infants, and the respondent, Helena Day McGlone, having duly filed her answer to the petition herein and having by stipulation dated September 14th, 1938, amended said answer, and Edward McGlone and Robert McGlone, infants, by George A. Voss, Esq., their Special Guardian, having filed their answer to the petition herein, and Ignatius V. McGlone having filed his answer to the petition herein by George A. Voss, Esq., his attorney, and Thomas F. McGlone and Rose McGlone Meredith having filed their answer to the petition herein by Orr & Brennan, Esqs., their attorneys, and the matter having come on for hearing and trial on the 25th day of May, 1939, and the petitioners having appeared by their attorneys, Orr & Brennan, Esqs., in support of said petition, and Thomas F. McGlone and Rose McGlone Meredith having appeared by their attorneys, Orr & Brennan, Esqs., and Edward McGlone and Robert McGlone, infants, having appeared by George A. Voss, Esq., their Special Guardian, and Ignatius V. McGlone having appeared by George A. Voss, Esq., his attorney, also in support of said petition, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., her attorney, in opposition to the relief prayed for in said petition, and after hearing the proofs and allegations of the parties, and after filing his decision in writing, the Surrogate having by decree dated June 27th, 1939, entered in the office of the Clerk of the Surrogate's Court, Kings County on said 27th day of June, 1939, ordered, adjudged and decreed that the prayer of the petitioners as contained in the petition be denied in all respects, and ordered, adjudged and decreed that Helena Day McGlone, surviving [fol. 62] spouse of the said John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent, and that the notice of election pursuant to Section 18 of the Decedent Estate Law duly served by the said Helena Day McGlone on the said executors, and filed and recorded, with proof of due service thereof, in the office of the Clerk of the Surrogate's Court of the County of Kings on the 30th day

of September, 1937, is a valid and effective exercise of such election, and ordered, adjudged and decreed that the said Helena Day McGlone is entitled to one-half of the net estate of said deceased after the deduction of debts, funeral and administration expenses and any estate tax, and ordered, adjudged and decreed that Irving Trust Company and Thomas F. McGlone, Jr., as executors aforesaid, pay to George A. Voss, Esq., special guardian of Edward McGlone and Robert McGlone, infants, the sum of $2,500.00 for services as such special guardian in this proceeding, and the said Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, the petitioners, and Thomas F. McGlone and Rose McGlone Meredith, and the above named Ignatius V. McGlone, and the above named Edward McGlone and Robert McGlone, infants, by George A. Voss, Esq., their Special Guardian, having appealed to the Appellate Division of the Supreme Court, Second Judicial Department, from that part and so much of said decree as denies the prayer of the petitioners as contained in the petition herein and orders, adjudges and decrees that Helena Day McGlone, surviving spouse of John J. McGlone, deceased, is entitled to exercise her personal right of elec- [fol. 63] tion to take against the terms of the Will and Codicil of said decedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30th, 1937, is a valid and effective exercise of such election, and orders, adjudges and decrees that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and administration expenses and any estate tax, and from each and every part of said decree, except so much of said decree as allows the sum of $2,500.00 to George A. Voss, Esq., Special Guardian of Edward McGlone and Robert McGlone, for his services as Special Guardian in this proceeding, and Ralph L. Kaskell, Jr., Esq., having been appointed and substituted as Special Guardian for said Edward McGlone and Robert McGlone, infants, in place and in stead of said George A. Voss, Esq., by order of the Surrogate of Kings County dated October 6th, 1939, and Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, having been substituted

as the respondent herein in place and in stead of Helena Day McGlone, by order of the Appellate Division of the Supreme Court, Second Judicial Department, dated October 23rd, 1939, and said Ralph L. Kaskell, Jr., as Special Guardian for said Edward McGlone and Robert McGlone, infants, having been substituted in place and in stead of said George A. Voss as Special Guardian for Edward McGlone and Robert McGlone, infants, by said order of the Appellate Division of the Supreme Court, Second Judicial Department, dated October 23rd, 1939, and said Appellate Division [fol. 64] of the Supreme Court, Second Judicial Department, having heard this cause argued, and having ordered and adjudged that the said decree of the Surrogate's Court of the County of Kings so appealed from be unanimously reversed on the law and the facts, with costs to appellants filing briefs, payable out of the estate of John J. McGlone, and that the matter be remitted to the Surrogate's Court for the entry of a decree as prayed for in the petition herein, and an order to this effect having been made and entered by the Appellate Division of the Supreme Court, Second Judicial Department, on January 29th, 1940.

Now, on reading and filing a certified copy of said order of the Appellate Division of the Supreme Court, Second Judicial Department, dated January 29th, 1940, and the costs of the appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith having been taxed and adjusted at the sum of $283.63, and the costs of the appellant Ralph L. Kaskell, Jr., as Special Guardian of Edward McGlone and Robert McGlone, infants, having been taxed and adjusted at the sum of $80.20, it is, on motion of Orr & Brennan, attorneys for the appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith,

Ordered, adjudged and decreed, that said order and judgment of the Appellate Division of the Supreme Court of the [fol. 65] State of New York, Second Judicial Department, be and the same are hereby made the order, judgment and decree of this Court, and it is further

Ordered, adjudged and decreed, that said decree of Honorable George Albert Wingate, Surrogate, dated and

entered in the office of the Clerk of the Surrogate's Court, Kings County, on June 27th, 1939, so appealed from, be and the same hereby is reversed, and it is further

Ordered, adjudged and decreed, that said Helena Day McGlone is not and was not entitled to elect to take her share of the estate of said decedent, John J. McGlone, as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law, and it is further

Ordered, adjudged and decreed, that said Helena Day McGlone voluntarily and irrevocably agreed to and did renounce, release and waive all rights in the estate of said John J. McGlone, deceased, and that such agreement, renunciation, release and waiver is in full force and effect, and it is further

Ordered, adjudged and decreed, that said Helena Day McGlone and Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, had and has no interest or share in the estate of said John J. McGlone, deceased, except as provided in paragraph marked "Third" of the Last Will and Testament of John J. McGlone, deceased; and it is further

Ordered, adjudged and decreed, that said Irving Trust Company, Thomas F. McGlone, Jr., as Executors under the [fol. 66] Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith recover retain out of the moneys now in the hands of the Executors, as such Executors, the sum of $283.63 as and for their costs on said appeal, and that they pay to Ralph L. Kaskell, Jr., as Special Guardian of Edward McGlone and Robert McGlone, infants, the sum of $80.20 as and for his costs on said appeal, and it is further

Ordered, adjudged and decreed, that Irving Trust Company and Thomas F. McGlone, Jr., as Executors aforesaid, pay to Ralph L. Kaskell, Jr., Esq., Special Guardian of Edward McGlone and Robert McGlone, infants, the sum of $1,000.00, hereby allowed him for services as Special Guardian in this proceeding.

G. A. W., Surrogate.

[fol. 67] IN SUPREME COURT OF NEW YORK

Appellate Division

[Title omitted]

ORDER ON APPEAL FROM SURROGATE'S COURT—January 29, 1940

[fol. 68] The above named Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, the petitioners, and Thomas F. McGlone and Rose McGlone Meredith, and the above named Ignatius V. McGlone, and the above named Edward McGlone and Robert McGlone, infants, by Ralph L. Kaskell, Jr., their Special Guardian, in this proceeding having appealed to the Appellate Division of the Supreme Court from a decree of the Surrogate's Court, of the County of Kings, made on the 27th day of June, 1939, in so far as it denies the application of the petitioners, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, to determine that Helena Day McGlone is not entitled to elect to take her share of the estate of the decedent as in intestacy pursuant to the provisions of Section 18 of the Decedent Estate Law, etc., and the said appeal having been argued by Mr. Philip Zierler, of Counsel for appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., and Thomas F. McGlone and Rose McGlone Meredith, and argued by Mr. Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants, appellant in person, and argued by Mr. Andrew F. Van Thun, Jr., of Counsel for respondent, and due deliberation having been had thereon:

It is Ordered and Adjudged that the decree of the Surrogate's Court of the County of Kings so appealed from be and the same hereby is unanimously reversed on the law and the facts, with costs to appellants filing briefs, payable [fol. 69] out of the estate of John J. McGlone, and the matter remitted to the Surrogate's Court for the entry of a decree as prayed for in the petition herein.

Enter:

E. L., P. J.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION

Carswell, J.—The executors of the testator petitioned that it be decreed that his widow was not entitled to elect, under section 18, Decedent Estate Law, to take against his will and codicil. Upon the executor's proof, the widow adducing none, the surrogate decreed that the widow had the right so to elect and had effectively exercised it. The executors and certain next of kin of the testator appeal. The widow died after the decree was entered and has been succeeded by her executor. This proceeding, therefore, has become a contest between the brothers, sister and nephews of the husband and three nieces of the widow.

The facts are not in dispute. They are contained in the pleadings, certain stipulations and two documents.

On February 2, 1922, the testator, John J. McGlone, and Mrs. Helena Day Snyder, American citizens, were in London, England. On that day Mrs. Snyder signed a document. She recited in it that she was of sound mind and, as the occasion was the eve of her marriage to McGlone on February 4, 1922, she wished to record of her own free will that she had ample property and a fortune of her own and as a [fol. 70] compliment to her prospective husband and for other good reasons she voluntarily and irrevocably renounced all right, title and interest that she might have, legally or otherwise, to share in any estate of McGlone of which he might die seized. This instrument in script, on a letterhead of the Savoy Hotel, was in the handwriting of an unidentified person. Mrs. Snyder's signature was conceded to be valid.

On February 4, 1922, McGlone and Mrs. Snyder were married. This was his first and her third marital venture. The authenticated record of the marriage discloses that McGlone was forty-seven years of age and an officer of a steamship line, and that Helena Day Snyder was forty-five years of age and a widow. The proof reveals this reference to forty five years was incorrect; that her real age was sixty-two. She had no children by her prior marriages nor by this one.

On August 21, 1930, as a resident of Brooklyn, McGlone made a will in which he recited the execution by his wife of the February 2, 1922, document waiving all claim to any

interest in his estate. He nevertheless provided that $2,000 should be used to purchase a token for her. On July 6, 1934, he executed a codicil which did not disturb the foregoing provision in the will.

On February 22, 1937, McGlone died. His will was admitted to probate on April 8, 1937. The widow executed and filed on September 23, 1937, an instrument purporting to be a notice of election, pursuant to section 18, Decedent Estate Law, to take against the will and codicil.

The first question is whether on the foregoing proof a presumption of constructive fraud arose from the mere re- [fol. 71] lation of the parties at the time the February 2, 1922, instrument was signed; and whether because of such a presumption the executors were obligated to adduce affirmative proof that the parties dealt with each other on terms of equality and fairness and that the act of Mrs. Snyder was voluntary and well understood.

The respondent invokes such a presumption. It concerns elements which are a species of fraud. The general rule is that fraud vitiates all contracts, but that it is not presumed. An exception arises when the relations of the parties to a contract evoke a presumption of constructive fraud, which presumption requires one invoking the contract to prove affirmatively that it was not the product of undue influence, inequality, overreaching, deception or mistake. This presumption is ordinarily applied to the relationship of guardian and ward; trustee and cestui que trust; attorney and client; and physician and patient. It is also applied to other close relationships when it is affirmatively established by proof of circumstances that the parties are not dealing on an equal basis (Cowee v. Cornell, 75 N. Y., 91, 99). The presumption does not arise from the mere relation of parent and child (Cowee v. Cornell, supra, p. 101; Carpenter v. Soule, 88 N. Y. 251, 256; Jones v. Jones, 137 N. Y. 610, 613; Williams v. Whittel, 69 App. Div. 340, 344). Under the rule which stems from the foregoing cases, no presumption arises merely from the equally close relation of husband and wife (La Tourette v. La Tourette, 54 App. Div. 137, 138; Green v. Benham, 57 App. Div. 9, 14; Donlon v. Donlon, 154 App. Div. 212, 216, 217; Matter of Rogers, 250 App. Div. 26, 28, leave to appeal denied, 274 N. Y. 642; 39 C. J. 668, sec. 244). These cases enforce the rule that in such relationships, whether a pre- [fol. 72] sumption of inequality or constructive fraud arises

"is a question of fact dependent upon the circumstances in each case. There is no presumption of inequality either way from these relations merely" (Cowee v. Cornell, supra, p. 101). "The law does not presume aught" from this type of mere relationship (Williams v. Whittel, supra, p. 344). Judicial utterances, invoked to support a contrary view, are to be found only in cases, otherwise authoritative, where there was affirmative proof of circumstances of inequality which raised a presumption of constructive fraud and shifted to the proponent of the instrument the burden of going forward with proof that it was executed with understanding, without overreaching and free from any vitiating element. It is when a vitiating element, even though slight, appears that such an agreement is subjected to searching scrutiny. The latter type of cases involving the relationship of parent and child (Green v. Roworth, 113 N. Y. 462; Bernard v. Gantz, 140 N. Y. 249) and the relationship of husband and wife (Pierce v. Pierce, 71 N. Y. 154; Graham v. Graham, 143 N. Y. 573; Lamb v. Lamb, 18 App. Div. 250) is not applicable here. When properly read and analyzed they manifest no essential conflict with the cases which control the instant case.

The burden of proving that the instrument of February 2, 1922, was validly executed rested upon the executors (30 C. J., 668, sec. 244; In re Duan's Estate, Dunn v. Dunn, 224 N. W. 38, Iowa). The unchallenged proof that this instrument was genuine was sufficient to establish prima facie that it was binding upon the widow (Pimpinello v. Swift & Co., 253 N. Y. 159, 162; Matter of Stone, 272 N. Y. 121, 124). The executors were not obligated to come forward with [fol. 73] further proof in the absence of proof from the widow indicating that she dealt with her prospective husband under circumstances of inequality, or with lack of understanding of the effect of her act. If such proof, even though slight, had been forthcoming, the burden or duty of going forward to rehabilitate the prima facie binding force of the instrument would then have shifted to the executors. The widow in seeking to repudiate her solemn writing was not aided by or armed with presumption of inequality (La Tourette v. La Tourette, supra) in the absence of some proof casting suspicion upon or tending to vitiate the instrument.

It has long been the practice of courts to enforce antenuptial agreements, whether they related to existing or after

acquired property as such agreements are favored (Johnston v. Spicer, 107 N. Y. 185, 194; Matter of Estate of Young v. Hicks, 92 N. Y. 235; Green v. Benham, supra). The relationship between husband and wife is, of course, sufficiently close and confidential to require but little affirmative proof in order to cast the burden upon one invoking an instrument executed by a spouse to come forward with affirmative proof that it was executed under circumstances of equality and fairness. This proof may take the form of lack of knowledge on the part of the one resisting the instrument; differences in knowledge of the respective parties; differences in mental or bodily strength; or unfairness and the like. The instrument itself may reveal want of fairness and lack of equality. But none of these elements is present here. The widow might have created the presumption she invokes and cast the burden upon the executors of establishing the fairness of the instrument and its inequal- [fol. 74] ity, if she had made proof—no doubt readily available to her if it were the fact—that the recitals in the instrument were untrue, and by reason of such a circumstance the inference might have been drawn that she was not dealing on a plane of equality with McGlone. She proffered no such proof, so that the recital of admissions made by her must be deemed to be true.

This view makes the executors' proof take on added strength because the instrument furnishes evidence or affirmative proof, by these recitals, in the absence of repudiation or challenge of them by the widow, that she dealt with McGlone under circumstances that were free from inequality and unfairness. The document contains internal evidence that she was possessed of an independent fortune and that because thereof she understandingly renounced any interest in her prospective husband's estate. Another circumstance in the record affirmatively points the same way. The marriage record discloses that the marriage took place two days after the instrument was signed. She gave her age as forty-five, when the fact is that she was sixty-two years of age when she married McGlone, who was then forty-seven years of age. This fact, and the further fact that it was her third marriage, give rise to implications that she was not lacking in experience or suffering from inequality. These facts also carry the further implication that the instrument was signed to induce the marriage.

These views respecting burden of proof were stated more briefly on a prior appeal in this case (256 App. Div. 1074) and result from a re-examination of the subject.

The next question concerns whether the form of the instrument of February 2, 1922, complies with section 18, sub- [fol. 75] division 9, of the Decedent Estate Law. It was not executed by both spouses. It was not necessary that it should be so executed. A unilateral agreement is sufficient when it is acted upon by the other spouse (Matter of Moore, 165 Misc. 683). This view is in accord with the law as it existed before the enactment of that section. Under pre-existing statutes a unilateral agreement affecting the marriage relation and rights thereunder, when acted upon, was valid (sec. 53, Dom. Rel. Law; sec. 31, subdiv. 3, Pers. Prop. Law; Wright v. Wright, 54 N. Y. 437; 30 C. J., 628, sec. 185).

It is asserted, however, that this instrument was merely subscribed and not acknowledged, as required by section 18, subdivision 9, Decedent Estate Law. That subdivision reads: "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument *subscribed and duly acknowledged*, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement *so executed* made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

The last sentence is the one here applicable. The words "so executed" contained therein incorporate by reference the requirement in the preceding sentence that the subscription shall be "duly acknowledged." The instrument therefore of February 2, 1922, does not comply with this requirement.

This necessitates determining whether the above last [fol. 76] sentence is constitutional. If it is invalid the lack of an acknowledgment is not fatal to the instrument. When that instrument was executed on February 2, 1922, there vested under it in the testator certain contract rights. The instrument was valid under the pre-existing statutes (sec. 53, Domestic Relations Law, sec. 31, subdiv. 3, Personal Property Law), which did not require an acknowledgement;

and an antenuptial agreement made in a foreign country is enforcible in this state (Lemye v. Sirker, 226 App. Div. 159, 161; Ross v. Ross, No. 1, 233 App. Div. 626).

This vesting occurred before the enactment of subdivision 9, section 18, Decedent Estate Law (Laws of 1929, chap. 229). The subsequent enactment therefore violated the testator's constitutional rights (U. S. Const., art. 1, sec. 10; N. Y. State Const., art. 1, sec. 6). By the former a state is forbidden to pass any law impairing the obligation of contracts; and the latter provides that a person shall not be deprived of property without due process of law. As subdivision 9 invades the contract rights vesting in McGlone prior to its enactment, it is invalid (Walker v. Whitehead, 83 U. S. 314; Edwards v. Kearzey, 96 U. S. 595; Tennessee v. Sneed, 96 U. S. 69; Louisiana v. New Orleans, 102 U. S. 203; McCahey v. Virginia 135 U. S. 662; Coolidge v. Long, 282 U. S. 582; Holmes v. Holmes, 4 Barb. 295, 303; Ralph v. Cronk, 266 N. Y. 428; Matter of Goldberg, 275 N. Y. 186, 189).

The entire sentence, however, need not be invalidated. It will be sufficient to sever, void or delete the words "so executed." It is universally recognized that a statute may be constitutional in part and unconstitutional in part, and that the invalid part may be severed from the remainder, if after [fol. 77] the severance the remaining portions are sufficient to effect the legislative purpose deducible from the entire act, construed in the light of contemporary event. "The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether" (People ex rel. Alpha P. C. Co. v. Knapp, 230 N. Y. 48, 54, 60, per Cardozo, J.; People v. Mancuso, 255 N. Y. 463, 472, 473). The deletion of the words "so executed" does not pervert the legislative purpose. That purpose was to save agreements previously executed. The language, however, went beyond this purpose and prescribed a form of execution more exacting that was required by pre-existing statutes and, as a consequence, violated previously vested contract rights under agreements whose form complied with the earlier statutes.

This view has the further effect of recognizing that the sentence with the deletion of the words "so executed" becomes declaratory, in substance, of the pre-existing statute law (sec. 53, Dom. Rel. Law; sec. 31, subdiv. 3, Pers. Prop.

Law) through which contract rights vested in the testator under the instrument of February 2, 1922, and which were acted upon by McGlone at the time of the marriage on February 4, 1922. So far as the form of the instrument, therefore, it is completely effective as being in compliance with subdivision 9, section 18, Decedent Estate Law, so far as the same is valid.

This leaves one further question—that of consideration. The February 2, 1922, instrument had a valid consideration. The marriage constituted that consideration. It has long been recognized as "among the highest considerations known to the law" (Kramer v. Kramer, 90 App. Div. 176, [fol. 78] 180; De Cicco v. Schweizer, 221 N. Y. 431, 438, 440; Matter of Miller, 77 App. Div. 473; Wright v. Wright, 54 N. Y. 437; American Surety Co. v. Conner, 251 N. Y. 1, 11).

Accordingly, the instrument of February 2, 1922, under the proof herein constituted a complete bar to the right of the widow to elect to take against the will and codicil of the testator.

The decree of the Surrogate's Court of Kings County, in so far as appealed from, should be reversed on the law and the facts, with costs to appellants filing briefs, payable out of the estate of John J. McGlone, and the matter remitted to the Surrogate's Court for the entry of a decree as prayed for in the petition herein.

[fol. 79] STIPULATION WAIVING CERTIFICATION ON APPEAL TO COURT OF APPEALS

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated by the attorneys for the respective parties that the foregoing are true copies of the notice of appeal to the Court of Appeals, the order of reversal herein, the decree appealed from, the opinion of Appellate Division and the record on appeal as filed with the Clerk of the Appellate Division, Second Department, all of which are now on file in the office of the Clerk of the Surrogate's Court and certification thereof by said Clerk is hereby waived.

Dated, New York, April 30, 1940.

Andrew F. Van Thun, Jr., Attorney for Appellant Chase L. Day, as Executor, etc., of Helena Day Mc-

Glone, deceased; Orr & Brennan, Attorneys for Respondents, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith; Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants, Respondents; Ignatius V. McGlone, Respondent appearing pro se.

[fol. 80] In Court of Appeals of New York

In the Matter of the Application of Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil Thereto of John J. McGlone, deceased, for a Determination of the Right of Helena Day McGlone to Elect under Section 18 of the Decedent Estate Law to Take against the Provisions of said Last Will and Testament and Codicil Thereto of John J. McGlone, Deceased.

Irving Trust Company et al., Respondents; Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased, Appellant.

Appeal by executor from unanimous order of Appellate Division, second department, reversing Surrogate on law and facts. Matter remitted.

Andrew F. Van Thun, Jr., for appellant.

Ralph L. Kaskell, Jr., and Philip Zierler for respondents.

Opinion—December 31, 1940

Lehman, Ch. J.

The widow of John J. McGlone, a resident of Kings county, who died in February, 1937, served notice upon the executors under his last Will and testament that she elected to take her share of the decedent's estate "as in intestacy" pursuant to section 18 of the Decedent Estate Law (Cons. Laws, ch. 13) (added by chapter 229 of the Laws of 1929 and thereafter amended.) The executors, claiming that the widow had waived and renounced all rights in her husband's estate, instituted proceedings pursuant to section 145-a of the Surrogate's Court Act for a determination of the validity and effect of the widow's attempted election. The Sur-

rogate sustained the widow's right to an election. The Appellate Division reversed the decree of the Surrogate and remitted the matter to the Surrogate's Court for the entry of a decree determining that an instrument executed by the widow in February, 1922, constitutes "a complete bar to the right of the widow to elect to take against the will and codicil of the testator".

On February 4, 1922, the decedent, John J. McGlone, and Helena Day Snyder were married in England. In contemplation of that marriage Helena Day Snyder, on February 2, 1922, signed the paper writing which, it has been held, bars her right to take a share in her husband's estate. It reads as follows: "I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized". She was at that time sixty-two years of age.

The decedent provided as follows for his wife in the third paragraph of his will, which he executed on August 21, 1930: "Third. My dear wife, Helena Day McGlone, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character".

[fol. 81] At the time he executed the will, section 18 of the Decedent Estate Law was not yet in effect and a husband was free to bequeath all his property to strangers. His wife would, in such case, have no right to any share in his estate, though she would have a right of dower in his real

property, except as she might have parted with, waived or lost such right of dower.

Thereafter, however, on July 6, 1934, the testator executed a codicil to the will of August 21, 1930. He did not therein make any additional provision for his wife or disturb the provision previously made; but since the term "will" as defined in the statute includes all codicils as well as will (Decedent Estate Law, Sec. 2), his wife, by force of the statute, became entitled upon the execution of the codicil to a right of election to reject the provision made for her in the will and to take her share of the estate "as in intestacy". Then, for the first time, the question became important whether the renunciation by the wife in 1922 of "all her right, title and interest in any estate real or personal" of which her "husband to be, John J. McGlone, might die seized" has the effect of barring her from asserting her statutory right of election created by a later statute.

The same section of the statute which creates, for the benefit of the surviving spouse of a decedent, a right not previously enjoyed, also provides the manner in which that right may be waived. "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument *subscribed and duly acknowledged*, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement *so executed*, made before or after marriage. An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section." (Decedent Estate Law, Sec. 18, subd. 9). The statute was intended, it is plain, to deny effect to a waiver not executed in accordance with the statute.

The statute requires that the agreement or instrument of waiver shall be "duly acknowledged" as well as subscribed and the instrument of waiver upon which the executors and legatees rely to defeat the right of election claimed by the widow was subscribed but not acknowledged by her. For that reason, as well as on other grounds, the Surrogate found that the instrument was without effect. The reversal by the Appellate Division is based upon its conclusion that in so far as the statute denies effect to an unacknowledged agreement of waiver or renunciation, previously executed which, even without acknowledgment, was valid at the time

it was executed, the statute violates the testator's constitutional rights guaranteed by article 1, section 10, of the Constitution of the United States and by article 1, section 6, of the Constitution of this State, and is, therefore, void. The Appellate Division rejected, for reasons stated in the opinion, the other grounds upon which the Surrogate based his contention that the waiver was ineffective.

We have examined these other grounds and without now deciding whether all of them are without substance we assume that the Appellate Division did not err in rejecting them; but we are constrained to disagree with the conclusion of the Appellate Division that the testator acquired by the instrument, executed in 1922 in contemplation of marriage, contractual rights, protected by the Constitution of the United States, which have been invaded by the new statute. We may assume, without now deciding or even considering such questions further, that the instrument of waiver, though [fol. 82] unilateral in form, evidences "a contract made between persons in contemplation of marriage" within the meaning of section 53 of the Domestic Relations Law (Cons. Laws, ch. 14); that it is executed in manner which satisfies the requirements of section 31 of the Personal Property Law (Cons. Laws, ch. 41); and that any contractual rights created by that instrument are within the protection of the constitutional guaranty that the State may not impair the obligations of contracts or take property without due process of law. That brings us to the question: what are those contractual or property rights which it is said are destroyed by the new statute?

Whatever be the extent of those contractual rights they did not include the right of the husband to bequeath his estate to such persons in such amounts as he chose and thus to exclude his wife from any share of his estate. That right was created by the laws of the State of New York, not by contract. The wife did not, of course, waive her right to take any part of the estate of her "husband to be" which he chose to bequeath to her, nor may the instrument be given effect as a waiver of a right of a wife to succeed to the property of her husband, which the Legislature might thereafter create. Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights though it may not take away property which has vested by virtue of such rights. (Matter of Sherman, 153 N. Y. 1; Norris v.

Beyea, 13 N. Y. 273). A wife cannot by agreement make the husband's right created by law immune from the right of the State to change the law which created the right nor waive in advance a right created for her benefit if the law does not permit such a waiver.

The widow makes here no claim for dower. She asserts no right which, at the time she executed the waiver of her rights in her husband's property, she might have asserted but for the waiver. The Legislature has determined to restrict the husband's rights, previously unrestricted, to provide by will how his property should pass at his death. Even then the Legislature did not decree that a will previously executed should not take effect at the testator's death in accordance with its terms. It decreed only that if a testator chose to execute a new will section 18 of the Decedent Estate Law would apply and that the testator's spouse would then have rights in the decedent's estate which the spouse would otherwise not possess. The Legislature did not by such statute destroy any rights which the decedent in this case acquired by the waiver—even though we give to such waiver the broadest possible construction and effect. The Legislature, with undoubted power to create for the benefit of the spouse of a testator a new right of succession to property and a new limitation upon the power of a testator to determine the succession or distribution by will, had also undoubted power to protect the newly-created right by a statutory provision that a spouse might not waive the benefit of the right created for his or her benefit except by an instrument executed with the formalities set forth in the statute. Quite probably the testator would not have executed a codicil to the will if he had known that his widow might, on that account, claim an interest in his estate which she would not otherwise have. That does not, however, give rise to an estoppel or other equitable ground for denying to the wife her statutory right.

The order of the Appellate Division should be reversed and the decree of the Surrogate's Court affirmed, with costs in this court and in the Appellate Division to all parties filing briefs payable out of the estate.

Loughran, Finch, Rippey, Sears, Lewis and Conway, JJ., concur. Ordered accordingly.

[fol. 83] In Court of Appeals of New York

In the Matter of the Application of Irving Trust Company & ano., as Exrs. &c., of John J. McGlone, dec'd, for a determination of the right of Helena Day McGlone to elect &c. to take against the provisions of said Last Will &c.

Remittitur—December 31, 1940

Be it remembered, That on the 14th day of October in the year of our Lord one thousand nine hundred and forty—Chase L. Day, as executor &c., of Helena Day McGlone, deceased—the appellant in this cause, came here unto the Court of Appeals, by Andrew F. Van Thun, Jr., his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Irving Trust Company and another, as executors &c., of John J. McGlone, deceased and others &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Orr & Brennan and others, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 84] Whereupon, the said Court of Appeals having heard this cause argued by Mr. Andrew F. Van Thun, Jr., of counsel for the appellant, and by Messrs. Philip Zierler and Ralph L. Kaskell, Jr. of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and decree of Surrogate's Court affirmed with costs in this court and in the Appellate Division to all parties filing briefs payable out of the estate.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogate's Court, Kings County there to be proceeded upon according to law. Therefore, it is considered that the said order of Appellate Division be reversed and decree of Surrogate's Court affirmed &c., as aforesaid.

And thereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogate's Court, Kings County before the Surrogate thereof, according to the form of the statute in such case made and provided, to be en-

forced according to law, and which record now remains in the said Surrogate's Court before the Surrogate thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, December 31, 1940

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 85] In Surrogate's Court, Kings County

Present: Hon. George Albert Wingate, Surrogate

In the Matter of the Application of Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the last Will and Testament and Codicil thereto of John J. McGlone, deceased, for a determination of the right of Helena Day McGlone to elect under Section 18 of the Decedent Estate Law to take against the provisions of said Last Will and Testament and Codicil thereto of John J. McGlone, deceased

Judgment on Remittur—January 24, 1941

The above named Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the last Will and Testament and Codicil thereto of John J. McGlone, deceased, having petitioned this Court by verified petition dated November 26th, 1937, for a decree adjudging, determining and decreeing that said Helena Day McGlone is not entitled to elect to take her share of the estate of said decedent as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law; adjudging, determining and decreeing that said Helena Day McGlone voluntarily and irrevocably agreed to and did renounce, release and waive all rights in the estate of said John J. McGlone, deceased; and that such agreement, renunciation, release and waiver is in full force and effect; adjudging, determining and decreeing that said Helena Day McGlone has no interest or share in

the estate of said John J. McGlone, deceased, except as provided in paragraph marked "Third" of the said Last Will and Testament of John J. McGlone, deceased, and a citation having thereupon issued out of this Court directed to [fol. 86] said Helena Day McGlone, Rose McGlone Meredith, Thomas F. McGlone, Ignatius V. McGlone, Edward McGlone, Robert McGlone and Thomas F. McGlone, Jr., requiring each of them to show cause at the Surrogate's Court, Kings County, on the 17th day of January, 1938, why a decree as prayed for in said petition should not be made, and said citation having been returned with proof of due service thereof upon all of the parties named, and the said petitioners having duly appeared on the return day of the citation by Orr & Brennan, Esqs., their attorneys, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., her attorney, and the Court having appointed George A. Voss, Esq., Special Guardian for Edward McGlone and Robert McGlone, infants, and the respondent, Helena Day McGlone, having duly filed her answer to the petition herein and having by stipulation dated September 14th, 1938, amended said answer, and Edward McGlone and Robert McGlone, infants, by George A. Voss, Esq. their Special Guardian, having filed their answer to the petition herein, and Ignatius V. McGlone having filed his answer to the petition herein by George A. Voss, Esq., his attorney, and Thomas F. McGlone and Rose McGlone Meredith having filed their answer to the petition herein by Orr & Brennan, Esq., their attorneys, and the matter having come on for hearing and trial on the 25th day of May, 1939, and the petitioners having appeared by their attorneys, Orr & Brennan, Esqs. in support of said petition, and Thomas F. McGlone and Rose McGlone Meredith having appeared by their attorneys, Orr & Brennan, Esqs., and Edward McGlone and Robert McGlone, infants, having appeared by George A. Voss, Esq., their Special Guardian, and Ignatius V. McGlone having appeared by George A. Voss, Esq., his attorney, also in support of said petition, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., her attorney, in opposition to the relief prayed for in said petition, and after hearing the proofs and allegations of the parties, and after filing his decision in writing, the Surrogate having by decree [fol. 87] dated June 27th, 1939, entered in the office of the Clerk of the Surrogate's Court, Kings County on said 27th

day of June, 1939, ordered, adjudged and decreed that the prayer of the petitioners as contained in the petition be denied in all respects, and ordered, adjudged and decreed that Helena Day McGlone, surviving spouse of the said John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent, and that the notice of election pursuant to Section 18 of the Decedent Estate Law duly served by the said Helena Day McGlone on the said executors, and filed and recorded, with proof of due service thereof, in the office of the Clerk of the Surrogate's Court of the County of Kings on the 30th day of September, 1937, is a valid and effective exercise of such election, and ordered, adjudged and decreed that the said Helena Day McGlone is entitled to one-half of the net estate of said deceased after the deduction of debts, funeral and administration expenses and any estate tax, and ordered, adjudged and decreed that Irving Trust Company and Thomas F. McGlone Jr., as executors aforesaid, pay to George A. Voss, Esq., special guardian of Edward McGlone and Robert McGlone, infants, the sum of $2,500.00 for services as such special guardian in this proceeding, and the said Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the last Will and Testament and Codicil thereto of John J. McGlone, deceased, the petitioners, and Thomas F. McGlone and Rose McGlone Meredith, and the above named Ignatius V. McGlone, and the above named Edward McGlone and Robert McGlone, infants, by George A. Voss, Esq., their Special Guardian, having appealed to the Appellate Division of the Supreme Court, Second Judicial Department, from that part and so much of said decree as denies the prayer of the petitioners as contained in the petition herein and orders, adjudges and decrees that Helena Day McGlone, surviving spouse of John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said [fol. 88] decedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30th, 1937, is a valid and effective exercise of such election, and orders, adjudges and decrees that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and

administration expenses and any estate tax, and from each and every part of said decree, except so much of said decree as allows the sum of $2,500.00 to George A. Voss, Esq., Special Guardian of Edward McGlone and Robert McGlone, for his services as Special Guardian in this proceeding, and Ralph L. Kaskell, Jr., Esq., having been appointed and substituted as Special Guardian for said Edward McGlone and Robert McGlone, infants, in place and in stead of said George A. Voss, Esq., by order of the Surrogate of Kings County dated October 6th, 1939, and Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, having been substituted as the respondent herein in place and in stead of Helena Day McGlone, by order of the Appellate Division of the Supreme Court, Second Judicial Department, dated October 23rd, 1939, and said Ralph L. Kaskell, Jr., as Special Guardian for said Edward McGlone and Robert McGlone, infants, having been substituted in place and in stead of said George A. Voss as Special Guardian for Edward McGlone and Robert McGlone, infants, by said order of the Appellate Division of the Supreme Court, Second Judicial Department, dated October 23rd, 1939, and said Appellate Division of the Supreme Court, Second Judicial Department, having heard this cause argued, and having ordered and adjudged that the said decree of the Surrogate's Court of the County of Kings so appealed from be unanimously reversed on the law and the facts, with costs to appellants filing briefs, payable out of the estate of John J. McGlone, and that the matter be remitted to the Surrogate's Court for the entry of [fol. 89] a decree as prayed for in the petition herein, and an order to this effect having been made and entered by the Appellate Division of the Supreme Court, Second Judicial Department, on January 29th, 1940, and an order making the said order of the Appellate Division the order and decree of the Surrogate's Court, Kings County, having been made by the Surrogate of the County of Kings on the 15th day of March, 1940, and the said Chase L. Day, as executor under the last Will and Testament of Helena Day McGlone, deceased, having appealed to the Court of Appeals of the State of New York from the said order of the Appellate Division of the Supreme Court, Second Department, dated January 29th, 1940, reversing the said decree of the Surrogate dated June 27th, 1939, and from the decree or order of the Surrogate's Court, Kings County, entered upon said

order of reversal of the said Appellate Division and dated the 15th day of March, 1940, except that part of the decree of the Surrogate entered on said order of reversal of the Appellate Division which allows the sum of $1,000.00 to Ralph L. Kaskell, Jr., special guardian for Edward McGlone and Robert McGlone, infants, for his services as special guardian, and the said appeal having come on to be heard before the Court of Appeals of the State of New York, and the said Court of Appeals having thereafter duly made an order dated the 31st day of December, 1940, whereby it was ordered and adjudged that the order of the Appellate Division of the Supreme Court so appealed from as aforesaid be reversed and the decree of the Surrogate's Court affirmed, with costs in this Court and in the Appellate Division to all parties filing briefs payable out of the estate, having ordered and adjudged that the proceedings therein be remitted to the Surrogate's Court, Kings County, and the Special Guardian having made and filed his report there to be proceeded upon according to law. Now, upon reading and filing the remittitur from the Court of Appeals therein, and the costs of the appellant Chase L. Day, as executor of the last Will and Testament of Helena Day McGlone, deceased, having been taxed and adjusted at the sum of [fol. 90] $338.95 and the costs of the respondent Irving Trust Company and Thomas F. McGlone, Jr., as executors under the last Will and Testament and Codicil thereto of John J. McGlone, deceased, and Thomas F. McGlone and Rose McGlone Meredith, having been taxed and adjusted at the sum of $140.44, and the costs of the respondent Ralph L. Kaskell, Jr., as special Guardian for Edward McGlone and Robert McGlone, infants, having been taxed and adjusted at the sum of $119.05, and on motion of Andrew F. Van Thun, Jr., attorney for the said appellant, it is

Ordered, Adjudged and Decreed, that the order of the Court of Appeals be and the same is made the order and decree of this Court; and it is further

Ordered, Adjudged and Decreed, that the prayer of the petitioners, as contained in the petition be and the same is in all respects denied; and it is further

Ordered, Adjudged and Decreed that Helena Day McGlone, surviving spouse of the said John J. McGlone, deceased, was in her lifetime entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent, and that the notice of election pur-

suant to Section 18 of the Decedent Estate Law duly served by the said Helena Day McGlone on the said executors, and filed and recorded, with proof of due service thereof, in the office of the Clerk of the Surrogate's Court of the County of Kings on the 30th day of September, 1937, was and is a valid and effective exercise of such election; and it is further

Ordered, Adjudged and Decreed that Chase L. Day, as executor of the last Will and Testament of the said Helena Day McGlone, deceased, is entitled to take and receive as said executor one-half of the net estate of the said deceased, John J. McGlone, after the deduction of debts, funeral and administration expenses and any estate tax; and it is further

[fol. 91] Ordered, Adjudged and Decreed that Irving Trust Company and Thomas F. McGlone, Jr., as executors aforesaid, pay to Chase L. Day, as executor of the last Will and Testament of Helena Day McGlone, deceased, the sum of $338.95, as and for his costs on said appeal and in the Appellate Division; and that it also pay to Ralph L. Kaskell, Jr., as special guardian of Edwa I McGlone and Robert McGlone, infants, the sum of $119.05, as and for his costs on said appeal; and that said Irving Trust Company and Thomas F. McGlone, Jr., as executors under the last Will and Testament and Codicil thereto of John J. McGlone, deceased, and Thomas F. McGlone and Rose McGlone Meredith, retain out of the moneys now in the hands of the executors, the sum of $140.44, as and for their costs on said appeal; and it is further

Ordered, Adjudged and Decreed that Irving Trust Company and Thomas F. McGlone, Jr., as executors aforesaid, pay to Ralph L. Kaskell, Jr., as special guardian of Edward McGlone and Robert McGlone, infants, the sum of Five hundred dollars, hereby allowed him for services as such special guardian on said appeal to the Court of Appeals.

G. A. W., Surrogate.

[fol. 92] In Court of Appeals of New York

[Title omitted]

Petition for Appeal—Filed March 27, 1941

To the Honorable Irving Lehman, Chief Justice of the Court of Appeals of the State of New York:

Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith, by Orr & Brennan, their attorneys, and Edward McGlone and Robert McGlone, infants, by Ralph L. Kaskell, Jr., Special Guardian, the above named appellants, complain and allege:

1. That this proceeding was commenced pursuant to Section 145-a of the Surrogate's Court Act upon the petition of the appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased.

2. That the issues in said proceeding were tried before the Surrogate of the County of Kings on the 25th day of May, 1939, and resulted in a decree (dated June 27th, [fol. 93] 1939), denying the prayer of the petitioners and adjudging that Helena Day McGlone, the surviving spouse of John J. McGlone, deceased, was entitled to exercise her right of election under Section 18 of the Decedent Estate Law, to take against the terms of the Will and Codicil of said decedent.

3. That the Appellate Division of the Supreme Court, Second Department, by order dated January 29th, 1940, unanimously reversed the decree of the Surrogate on the law and the facts, and directed the entry of a decree as prayed for in the petition. The said Court decided that Subdivision 9, Section 18 of the Decedent Estate Law invaded the contract rights which vested in the testator prior to its enactment; that it violated the rights guaranteed to the testator by Article I, Section 10 of the Constitution of the United States, and Article I, Section 6 of the Constitution of the State of New York; and that it is invalid insofar as it denies effect to an unacknowledged agreement of waiver or renunciation previously executed, which without acknowledgment, was valid at the time it was executed. On

the 15th day of March, 1940, a decree was entered in the Surrogate's Court, Kings County, upon said order of reversal.

4. That on the appeal by the respondent above named to the Court of Appeals of the State of New York, said Court, by order dated December 31st, 1940, reversed the order of the Appellate Division and decree of the Surrogate's Court entered thereon, and affirmed the original decree of the Surrogate. On the 24th day of January, 1941, a final judgment and decree was entered against your petitioners in the Surrogate's Court, Kings County, on the remittitur of the Court of Appeals of the State of New York, that being the highest Court of law or equity in the State of New York.

5. That said Court of Appeals held that the provision of Subdivision 9, Section 18 of the Decedent Estate Law which [fol. 94] requires that an agreement made before the taking effect of said section, wherein a spouse has waived or released all rights in the estate of the other spouse, shall be "duly acknowledged", is not in conflict with Article I, Section 10 of the Constitution of the United States, and does not violate the due process clause of the Constitution, all of which appears from the record and proceedings of the case and the opinion, decision and judgment of the Court. As a result thereof appellants have been greatly damaged.

6. That appellants have, with this petition, filed with the Clerk of said Court of Appeals of the State of New York, an assignment of errors setting out separately and particularly each error asserted by them, and also present herewith a separate typewritten statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

Wherefore, your petitioners pray the allowance of an appeal from said judgment to the Supreme Court of the United States to the end that the record in said matter may be removed into said Supreme Court and the errors complained of by your petitioners may be examined and corrected, and said judgment reversed.

Dated, March 18th, 1941.

Irving Trust Company, by George A. Murphy, Assistant Secretary; Thomas F. McGlone, Jr., As Executors under the Last Will and Testament and

Codicil thereto of John J. McGlone, deceased; [fols. 95-97] Thomas F. McGlone, Rose McGlone Meredith, Ralph L. Kaskell, Jr., Special Guardian of Edward McGlone and Robert McGlone, infants; Orr & Brennan, Attorneys for Appellant, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith. Office and P. O. Address, 16 Court Street, Brooklyn, N. Y.; Ralph L. Kaskell, Jr., Special Guardian per se. Office and P. O. Address, 159-24 Jamaica Avenue, Jamaica, N. Y.

Duly sworn to by George A. Murphy et al. Jurats omitted in printing.

[fol. 98] In Court of Appeals of New York

[Title omitted]

Assignment of Errors—Filed March 27, 1941

Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone, Rose McGlone Meredith, by Orr & Brennan, their attorneys, and Edward McGlone and Robert McGlone, infants, by Ralph L. Kaskell, Jr., Special Guardian, assign the following errors in the record and proceedings in the above entitled cause:

1. The Court of Appeals of the State of New York erred in holding that the provisions of Subdivision 9, Section 18 of the Decedent Estate Law of the State of New York, (Chapter 229, Section 4, Laws of 1929, as amended by Chapter 174, Section 1, Laws of 1930), are not in conflict with and in violation of Section 10 of Article I of the Constitution of the United States which prohibits any State from passing a law impairing the obligations of contract.

[fol. 99] 2. Said Court of Appeals erred in holding that the provisions of Subdivision 9, Section 18 of the Decedent Estate Law of the State of New York, (Chapter 229, Section 4, Laws of 1929, as amended by Chapter 174, Section 1, Laws of 1930), are not in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States which

prohibits any State from depriving persons of their property without due process of law.

3. Said Court of Appeals erred in holding that the decedent, John J. McGlone, did not acquire, by the instrument executed by Helena Day McGlone (then Helena Day Snyder), on February 2nd, 1922, contractual rights, protected by the Constitution of the United States, which have been invaded by Subdivision 9, Section 18 of said Decedent Estate Law.

4. Said Court of Appeals erred in holding that the obligations of contract between John J. McGlone and Helena Day McGlone were not impaired by the provision of Subdivision 9, Section 18 of said Decedent Estate Law requiring a waiver or release made before the effective date of the statute to be acknowledged.

5. Said Court of Appeals erred in holding that the appellants and the testator, John J. McGlone, were not deprived of their property without due process of law.

6. Said Court of Appeals erred in holding that the contractual rights acquired by the testator, John J. McGlone, pursuant to said instrument dated February 2nd, 1922, did not include the right to exclude his wife, Helena Day McGlone, from any share of his estate.

7. Said Court of Appeals erred in holding that said Helena Day McGlone did not waive her right to take any part of the estate of her husband-to-be, John J. McGlone.

8. Said Court of Appeals erred in holding that the instrument dated February 2nd, 1922, executed by Helena Day [fol. 100] McGlone may not be given effect as a waiver of a right to succeed to property of her husband, which the Legislature might thereafter create.

9. Said Court of Appeals erred in holding that an agreement, in contemplation of marriage, within the meaning of Section 53 of the Domestic Relations Law of the State of New York (Consolidated Laws, Chapter 14), made before the effective date of Section 18, Subdivision 9 of the Decedent Estate Law of the State of New York, and executed in a manner which satisfied the requirements of Section 31 of the Personal Property Law of the State of New York (Consolidated Laws, Chapter 41), whereby the wife-to-be

has waived or released all rights in the estate of her husband-to-be, is unenforceable if not acknowledged, though otherwise valid at the time it was executed.

10. Said Court of Appeals erred in holding that the facts in the case did not give rise to an estoppel or other equitable ground for denying to said Helena Day McGlone her statutory right to elect, as provided in Section 18 of said Decedent Estate Law of the State of New York

For which errors appellants pray that the order of the Court of Appeals of the State of New York, dated December 31st, 1940, and the decree dated January 24th, 1941, entered in the Surrogate's Court, County of Kings, upon the remittitur of the Court of Appeals, be reversed and a decree rendered in favor of the appellants.

Dated, March 18th, 1941.

Orr & Brennan, Attorneys for Appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith; Ralph L. Kaskell, Jr., Special Guardian appearing per se.

[fol. 101] In Court of Appeals of New York

[Title omitted]

Order Allowing Appeal—Filed March 27, 1941

The appellants above named having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled suit on the 24th day of January, 1941, in the Surrogate's Court, Kings County, on the remittitur of the Court of Appeals of the State of New York, and pursuant to the order of said Court dated December 31st, 1940, and from said order and from each and every part of said decree and order, and having presented and filed their Petition for Appeal, Assignment of Errors and Statement as to Jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It Is Ordered, that an appeal be and the same is hereby allowed to the Supreme Court of the United States, in the

above entitled cause, as provided by law, and it is further [fol. 102] Ordered, that the Clerk of the Court of Appeals of the State of New York prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Clerk of the Supreme Court of the United States so that he shall have the same in said Court within twenty days of this date.

And It Is Further Ordered, that security for costs on appeal be fixed at the sum of Five Hundred ($500.00) Dollars. Said appellants now presenting their bond in the sum of Five Hundred ($500.00) Dollars executed by National Surety Corporation, as surety, it is further,

Ordered, that such bond be and the same is hereby approved.

Dated, New York, this 24 day of March, 1941.

Larry Lehman, Chief Judge of the Court of Appeals of the State of New York.

[fols. 103-105] Bond on Appeal for $500.00 filed March 27, 1941 omitted in printing.

[fol. 106] Citation in usual form showing service on Andrew F. Van Thun, Jr., filed March 27, 1941, omitted in printing.

[fol. 107] In Court of Appeals of New York

[Title omitted]

Praecipe for Transcript of Record

To the Clerk of the Surrogate's Court, Kings County:

You Are Hereby Requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal in the above entitled cause, and to include in said transcript of record the following papers and exhibits, to wit:

1. Record on Appeal in the Court of Appeals of the State of New York, including specifically:

(a) Statement Under Rule 234.

(b) Notice of Appeal by Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith.

(c) Notice of Appeal by Ignatius V. McGlone.

(d) Notice of Appeal by Special Guardian for Edward McGlone and Robert McGlone, infants.

(e) Decree Appealed from.

(f) Petition, including Exhibit "A" and Exhibit "B", attached to Petition.

(g) Answer of Helena Day McGlone.

(h) Stipulation Amending Answer.

(i) Answer of Ignatius V. McGlone.

(j) Answer of Edward McGlone and Robert McGlone, infants, by Special Guardian.

[fol. 108] (k) Answer of Thomas F. McGlone and Rose McGlone Meredith.

(l) Hearing.

(m) Opinion.

(n) Stipulation Settling Case.

(o) Order Settling and Filing Case.

(p) Stipulation Waiving Certification.

(q) Order Filing Record in Appellate Division.

(r) Petitioner's Exhibit 1—Stipulation.

(s) Petitioner's Exhibit 2—Same as Exhibit "B" attached to Petition.

(t) Petitioner's Exhibit 3—Marriage Certificate.

(u) Notice of Appeal to Court of Appeals.

(v) Order Appealed from.

(w) Order on Appeal from Surrogate's Court.

(x) Opinion of Appellate Division.

(y) Stipulation Waiving Certification on Appeal to Court of Appeals.

2. Order of the Court of Appeals dated December 31st, 1940.

3. The opinion of the Court of Appeals.

4. The final decree dated January 24th, 1941, entered in the Surrogate's Court, Kings County, on the remittitur of the Court of Appeals.

5. The petition for appeal to the Supreme Court of the United States.

6. The assignment of Errors.

7. The order allowing the appeal and approving the bond.

8. The Statement of Jurisdiction.

9. The Citation on Appeal signed by the Chief Judge of the Court of Appeals of the State of New York.

10. The Bond for costs of appeal.

11. The Notice as to Paragraph 3, Rule 12 of the United States Supreme Court Rules

12. The Proof of Service of the Petition for Appeal, Order allowing Appeal, Assignment of Errors, Statement as to Jurisdiction, Bond, Notice with respect to Rule 12, Paragraph 3 of the Rules of the Supreme Court and Praecipe for transcript of record.

13. This Praecipe.

14. Appellee's statement opposing jurisdiction of the Court.

[fol. 109] Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States.

Dated, April 9th, 1941.

Orr & Brennan, Attorneys for Appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith; Ralph L. Kaskell, Jr., Special Guardian per se.

The undersigned acknowledges service of a copy of the foregoing Praecipe for Transcript of Record, and hereby waives designation of Counter-Praecipe.

Dated, April 9th, 1941.

Andrew F. Van Thun, Jr., Attorney for Appellee, Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased.

[fol. 110] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 111] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed April 24, 1941

The appellants in the above entitled cause adopt their Assignment of Errors as their statement of the points to

be relied upon, and state that the whole of the record as filed is necessary for the consideration of the case.

Dated, April 23rd, 1941.

Philip Zierler, Counsel for Appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith.

Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants.

Service of the foregoing statement and designation upon the undersigned is hereby acknowledged this 23 day of April, 1941.

Andrew F. Van Thun, Jr., Attorney for Appellee.

[fol. 112] [File endorsement omitted]

Endorsed on Cover: File No. 45,317 New York, Surrogate's Court, Kings County, Term No. 968. Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, Deceased, et al., Appellants, vs. Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased. Filed April 21, 1941. Term No. 968 O. T. 1940.